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Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test

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SYMBOLS, PERCEPTIONS, AND DOCTRINAL ILLUSIONS: ESTABLISHMENT NEUTRALITY AND THE "NO ENDORSEMENT" TEST

Steven D. Smith*

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* Associate Professor of Law, University of Colorado. B.A. 1976, Brigham Young University; J.D. 1979, Yale University. — Ed. I thank David DeWolf and Sheldon Vincenti for reading and commenting upon an earlier draft of this article. In addition, I presented an oral version of part of the present argument before the law faculties at Brigham Young, Cincinnati, Colorado, Indiana-Bloomington, and Ohio State; the questions and criticisms posed by members of those faculties have helped me in developing the argument.

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Among the proliferating array of proposals for reforming the doctrine of the establishment clause,¹ the "no endorsement" test advocated by Justice O'Connor may seem the most promising.² Although the Supreme Court has not yet accepted O'Connor's proposal in its entirety, her essential proposition — that government should not endorse religion — has worked its way into several majority opinions,³ portending possible adoption of the "no endorsement" test. To many observers, this would evidently be a welcome development; O'Connor's proposal has received the praise of numerous scholars who believe that a "no endorsement" test could provide doctrinal clarity and consistency, or that the test captures, at least in important part, the essential meaning of the establishment clause.⁴

This article will argue that the "no endorsement" proposal does indeed represent a significant development — but for a less auspicious reason. Far from eliminating the inconsistencies and defects that have plagued establishment analysis, the "no endorsement" test would introduce further ambiguities and analytical deficiencies into the doctrine. Moreover, the theoretical justifications offered for the test are unpersuasive. Despite these drawbacks, the "no endorsement" test appeals to scholars and jurists because it expresses the direction in which establishment doctrine and analysis seem to be drifting; the test represents a culmination of the venerable quest to define a position of governmental neutrality — and, recently, of "symbolic" neutrality — towards religion. Thus, the "no endorsement" proposal is significant not only because it may become the law but, perhaps as importantly,

1. For a recent effort to reduce the numerous competing viewpoints into a manageable set of categories, see McConnell, *You Can't Tell the Players in Church-State Disputes Without a Scorecard*, 10 HARV. J. L. & PUB. POLY. 27 (1987).

2. Justice O'Connor's proposal is described in detail at notes 21-44 *infra* and accompanying text.

3. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2578-79 (1987); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 488-89 (1986); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985).

4. For citations to academic commentary praising the "no endorsement" test, see note 45 *infra*.

because it provides a focal point for examining, and criticizing, the prevailing doctrinal drift.

Section I of this article briefly describes the emergence and development of the "no endorsement" test.⁵ Section II then seeks to show that the test is deficient as doctrine, and thus incapable of providing the clarity and coherence that current doctrine so sorely lacks. Section III considers various likely theoretical justifications for the "no endorsement" proposal, including the justification advanced by Justice O'Connor, and concludes that these justifications, like the test itself, are seriously flawed. This conclusion provokes a question: If the "no endorsement" test is doctrinally deficient and without theoretical justification, why has it elicited such widespread enthusiasm? Section IV attempts to answer this question by depicting the "no endorsement" test as an expression of the long-standing yearning to achieve governmental "neutrality" in matters of religion, and in particular of recent proposals which seek to avoid past failures by focusing upon "symbolic" rather than actual or "substantive" neutrality.

To explain its appeal, however, is not to justify the test. Section V of this article shows the futility of attempting to avoid contradiction and incoherence by seeking neutrality in symbolism and perceptions. The article concludes that the defects of the "no endorsement" test, and of the jurisprudence of symbolism, manifest the emptiness of neutrality as a guide to church-state relations. The problem is not that the concept of neutrality is false, meaningless, or inapplicable to establishment doctrine, but rather that the concept is purely formal and parasitic — and thus incapable of generating substantive solutions to establishment problems. If the "no endorsement" test ultimately offers cause for hope, therefore, the hope is that the test's deficiencies, once perceived, will prompt jurists and scholars to leave behind what has proven to be a doctrinal dead end and turn their attention to exploring more promising avenues that may lead toward an adequate establishment doctrine.

I. THE EMERGENCE OF THE "NO ENDORSEMENT" TEST

The Supreme Court's modern efforts to give doctrinal content to the establishment clause began in 1947;⁶ but it was not until 1971 that

5. Because general descriptive overviews of the Supreme Court's modern establishment cases are already abundant, the present essay will forbear to present another such overview. Readers desiring useful general reviews of modern religion clause decisions may consult Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986); L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 121-64 (1986).

6. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

the Court settled upon the test that dominates current establishment doctrine. In *Lemon v. Kurtzman*,⁷ the Court declared that in order to survive an establishment challenge a law must meet three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁸

Although the *Lemon* test has survived for over a decade and a half, few have found the formulation satisfactory.⁹ One frequent criticism asserts that decisions under the test have been chaotic;¹⁰ commentators have been irresistibly drawn to "Alice in Wonderland" allusions.¹¹ Critics commonly intone what has become an almost canonized litany of paired but manifestly inconsistent decisions purporting to apply the test.¹²

In a similar vein, critics — and dissenting Justices — often insist that the Court has distorted or misapplied the *Lemon* test in particular cases. Such criticism reached a crescendo following *Lynch v. Donnelly*,¹³ in which the Court, ostensibly applying the *Lemon* test, approved the use by the City of Pawtucket, Rhode Island, of a crèche in

7. 403 U.S. 602 (1971).

8. 403 U.S. at 612-13 (citation omitted) (quoting *Walz v. Tax Commn.*, 397 U.S. 664, 674 (1970)).

9. Mark Tushnet notes that "virtually everyone who has thought about the religion clauses . . . finds the Supreme Court's treatment of religion clause issues unsatisfactory." Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 997 (1986).

10. See, e.g., McCoy & Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 252 (1986) (arguing that on a doctrinal level "the Court's various approaches and results are impossible to reconcile"); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 315 (1986) (noting the "schizophrenic pattern of decisions"); Cornelius, *Church and State — The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 8 (1984) (asserting that observers are "virtually unanimous" in finding establishment decisions "inconsistent and unprincipled"); cf. L. LEVY, *supra* note 5, at 128 (establishment decisions "make distinctions that would glaze the minds of medieval scholastics"); Laycock, *supra* note 5, at 450 (arguing that the *Lemon* test is "so elastic in its application that it means everything and nothing"); Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 846, 848 (1984) (establishment decisions reflect "incantation of verbal formulae devoid of explanatory value").

11. See Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1, 10 (1984) (establishment decisions seem "derived from Alice's Adventures in Wonderland"); L. LEVY, *supra* note 5, at 181 (establishment decisions seem to come from "a Humpty Dumpty Court" which, as Humpty told Alice, thinks words can mean anything it says they mean); G. GOLDBERG, *RECONSECRATING AMERICA* 75 (1984) (arguing that "Burger's opinion in *Lemon v. Kurtzman* seems to have been written by the Mad Hatter").

12. See, e.g., Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 701-02 (1986); L. LEVY, *supra* note 5, at 128-29, 162-63; Paulsen, *supra* note 10, at 316; Kurland, *supra* note 11, at 10-11; Cornelius, *supra* note 10, at 6-8.

13. 465 U.S. 668 (1984).

the city's Christmas display. The reaction to the decision reflects the depth of discontent that has accumulated during the tenure of the *Lemon* test. Two decades earlier, Professor Wilbur Katz had suggested that although a publicly sponsored nativity scene offended the establishment clause, the offense could be excused under a *de minimis* rationale. "If this means that our neutrality is a bit more neutral toward some than toward others," Katz calmly observed, "a sense of humor should enable all of us to accept the situation . . ."¹⁴ Contemporary critics, by contrast, found nothing humorous in *Lynch*. Leo Pfeffer compared *Lynch* to the *Dred Scott* decision.¹⁵ Other commentators found the decision "devastating to first amendment doctrine,"¹⁶ "disingenuous" and "sleazy,"¹⁷ "wholly unprincipled and indefensible,"¹⁸ and "a paradigmatic disregard of the establishment clause in virtually every dimension of its concerns."¹⁹

Like the critics, Justice O'Connor was evidently troubled by the Court's reasoning in *Lynch*. Although joining in the majority opinion, she attempted to place the decision on a firmer footing by proposing, in a separate opinion, a "clarification" of the *Lemon* test. Her proposal focuses on the factor of governmental "endorsement" of religion.²⁰ In O'Connor's approach, the secular purpose prong of the *Lemon* test would mean that government may not act with the *intent* of endorsing, or disapproving of, religion. *Lemon*'s requirement of a primarily secu-

14. W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 23-24 (1964).

15. L. PFEFFER, RELIGION, STATE, AND THE BURGER COURT 124 (1984). Pfeffer argued that both decisions were "predicated upon the same basic concept: the inherent inferiority of ethnic groups, either because of color of skin or religious commitment." *Id.*

16. Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 353 (1986).

17. Kurland, *supra* note 11, at 12-13.

18. Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986).

19. Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 781. For additional harsh reaction to the decision, see, e.g., Dorsen, *The United States Supreme Court: Trends and Prospects*, 21 HARV. C.R.-C.L. L. REV. 1, 22 (1986) (*Lynch* "marked the greatest incursion to date on the separation of church and state"); Dorsen & Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837; Note, *Lynch v. Donnelly: Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185 (1985). Mark Tushnet concludes that just as compatibility with *Brown v. Board of Education* is a criterion for an acceptable constitutional theory, "a criterion for an acceptable theory of the religion clauses is whether that theory explains why the Court's decision in *Lynch* was wrong." Tushnet, *supra* note 9, at 999 n.4.

20. O'Connor's choice of the crèche case to announce this "endorsement" rationale seems ironic; opponents of the decision might well reply that far from rationalizing the result, an "endorsement" analysis in fact identifies precisely what was objectionable in the case. The crèche, after all, provided little or no material assistance to religion, but it did "endorse" Christianity, or at least create perceptions of endorsement. See note 132 *infra*. Thus, the circumstances of the test's own nativity did not bode well for its prospects of rescuing establishment doctrine from confusion and incoherence.

lar effect would be modified to mean that laws or governmental practices are invalid if they create a *perception* that government is endorsing or disapproving of religion.²¹ A law which avoids creating a perception of endorsement could be sustained even though "it in fact causes, even as a primary effect, advancement or inhibition of religion."²² Conversely, a law which appears to endorse religion would presumably be unconstitutional even though religion in reality derived no significant benefit from the law.

Justice O'Connor's *Lynch* opinion offered two justifications for the "no endorsement" test. One was practical in character; the "no endorsement" test, O'Connor contended, "clarifies the *Lemon* test as an analytical device."²³ The other justification was more theoretical. O'Connor started from the fundamental premise that "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."²⁴ She then argued that government might transgress that prohibition either by "excessive entanglement with religious institutions" or by endorsing or disapproving of religion. "Endorsement," she explained, "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."²⁵

In later cases, Justice O'Connor reaffirmed and elaborated upon the "no endorsement" proposal. In *Wallace v. Jaffree*,²⁶ the Court struck down, for want of a secular legislative purpose, an Alabama statute authorizing a moment of silence in public schools for "meditation or voluntary prayer." Concurring, O'Connor again offered her "no endorsement" proposal as a "refinement" of the *Lemon* test, and reiterated both the practical and theoretical justifications for that proposal.²⁷ She agreed that the "moment of silence" law was unconstitu-

21. *Lynch*, 465 U.S. at 688-92 (O'Connor, J., concurring). O'Connor indicated that she would also preserve the prohibition against excessive institutional entanglement between government and religion, but would not regard political divisiveness as evidence of entanglement. 465 U.S. at 689.

22. 465 U.S. at 691-92.

23. 465 U.S. at 689.

24. 465 U.S. at 687.

25. 465 U.S. at 687-88.

26. 472 U.S. 38 (1985).

27. O'Connor again argued that "[t]he endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring). She also restated her contention that the establishment clause prohibits government from making religion relevant to political standing and that endorsement violates this principle by making nonadherents feel like "outsiders, not full members of the political community." 472 U.S. at 69.

tional because, in her view, the law had been intended and would be perceived as an endorsement of prayer, thereby violating both prongs of the "no endorsement" test.²⁸

O'Connor's *Wallace* opinion also gave further analytical content to the "no endorsement" test. She emphasized that the review of legislative intent under the test's first prong should be "deferential and limited."²⁹ She also elaborated upon the "perception" prong; contrary to her language in *Lynch*, which had suggested that the relevant perceptions were those of real human beings who are the recipients of messages from government,³⁰ O'Connor now made clear that the dispositive question is whether the law would be perceived as endorsement by an "objective observer" who is familiar with the text, legislative history, and implementation of the law in question.³¹ In addition, the "objective observer" should be understood to be familiar with the values recognized in the free exercise clause.³² This qualification represents an attempt to justify limited government accommodation of religion, and to escape the oft-noted tension between the free exercise and establishment clauses. Government sometimes confers special privileges upon some persons because of their religious beliefs. Some privileges, such as the right to receive unemployment compensation while refusing for religious reasons to work on Saturdays, may even be required by the free exercise clause.³³ If similar privileges are denied to nonbelievers, an untutored observer might well perceive the conferral of such special privileges as an endorsement of religion and thus, under O'Connor's test, as a violation of the establishment clause. Justice O'Connor's more sophisticated "objective observer," however, would draw no such conclusion, but instead would understand that the privilege was intended to further free exercise values.³⁴

This qualification of the "no endorsement" principle was underscored in *Estate of Thornton v. Caldor, Inc.*,³⁵ a decision striking down a Connecticut statute requiring employers to excuse employees from

28. 472 U.S. at 67, 77-79.

29. 472 U.S. at 74-75.

30. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

31. *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).

32. 472 U.S. at 83.

33. See *Hobbie v. Unemployment Appeals Commn.*, 107 S. Ct. 1046 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

34. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring). Whether this qualification of the "no endorsement" test actually does anything to resolve the conflict between the clauses is questionable. If the free exercise clause requires government to confer special privileges upon religious believers, then one might conclude that the free exercise clause itself endorses religion and thereby offends what, according to O'Connor, is a principal concern of the establishment clause.

35. 472 U.S. 703 (1985).

work on whatever day of the week employees might regard as their Sabbath. Justice O'Connor concurred because she believed that the unqualified accommodation required by the statute would be perceived as an endorsement of religion.³⁶ However, she asserted that analogous federal accommodation provisions in Title VII of the Civil Rights Act of 1964,³⁷ requiring employers to make "reasonable" efforts to accommodate employees' religious beliefs, are not unconstitutional. Because the duty to accommodate is not absolute, an "objective observer" would perceive Title VII's requirement not as endorsing religion, but merely as furthering free exercise values.³⁸

More recently, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,³⁹ Justice O'Connor again enlisted the "objective observer" to justify an accommodation of religion. The question in *Amos* was whether amended section 702 of the Civil Rights Act,⁴⁰ which exempts religious organizations from the prohibition against employment discrimination, unconstitutionally advances, or discriminates in favor of, religion. Upholding the exemption, the Court distinguished between cases in which "the government itself has advanced religion through its own activities and influence" and cases in which government merely "allows churches to advance religion."⁴¹ The exemption from employment discrimination laws fell into the latter category, and was therefore permissible. Justice O'Connor found this distinction untenable, but concurred in the judgment on the basis of her "no endorsement" rationale.⁴² She recognized that the exemption for religious organizations "does have the effect of advancing religion," but nonetheless concluded that with respect to nonprofit religious organizations "the objective observer should perceive the government action as an accommodation of the exercise of religion rather than as a government endorsement of religion."⁴³ O'Connor implied without actually deciding, however, that the exemption may be invalid if applied to profitmaking religious organizations.⁴⁴

36. 472 U.S. at 711 (O'Connor, J., concurring).

37. 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (1982).

38. 472 U.S. at 711-12.

39. 107 S. Ct. 2862 (1987).

40. 42 U.S.C. § 2000e-1 (1982).

41. *Amos*, 107 S. Ct. at 2868-69 (emphasis in original).

42. 107 S. Ct. at 2874-75 (O'Connor, J., concurring).

43. 107 S. Ct. at 2874-75 (emphasis in original).

44. 107 S. Ct. at 2875. In terms of her own test, O'Connor's decision to distinguish between nonprofit and profitmaking organizations, and to reserve the question of whether profitmaking organizations can be exempted, seems questionable. Although *Amos* involved a nonprofit organization — the Latter-Day Saints-operated Deseret Gymnasium — the statutory exemption itself

Thus, after initially proposing the "no endorsement" test in *Lynch*, Justice O'Connor has continued to advocate and refine the test. Her efforts seem to be having an effect. Numerous academic commentators have written approvingly of the test.⁴⁵ Lower courts have begun

is not expressly limited to nonprofit organizations; it extends, without express limitation, to "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1 (1982). It would seem that an astute "objective observer," charged with determining whether the statute communicates a message of endorsement, might consider the statute as written and adopted by Congress. Justice O'Connor did not explain why the observer, rather than reading the statute, would look only to the statute's effect in a particular case.

45. Several full-length analyses of Justice O'Connor's proposal, while occasionally doubtful about particular aspects of her formulation such as the "objective observer" standard, see note 106 *infra*, have been highly favorable toward her approach generally. See Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987); Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986); Comment, *Lemon Reconstituted: Justice O'Connor's Proposed Modification of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465; see also Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

Other commentators have praised O'Connor's proposal in passing, but with less extensive discussion. See Note, *Developments in the Law — Religion and the State*, 100 HARV. L. REV. 1607, 1647 (1987) (O'Connor's "reformulation properly suggests that establishment clause inquiry should focus on the impact of state actions on nonadherents of benefitted creeds, lest the state place a 'badge of inferiority' on these citizens because of their beliefs") (quoting Loewy, *supra*, at 1051 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896))) [hereinafter Harvard Note]; Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1160 (1987) ("no endorsement" approach "provides a standard capable of consistent application and avoids the criticism levelled against the *Lemon* test"); Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631, 1638 (1986) (describing O'Connor's proposal as a "promising approach"); Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 55 (approving O'Connor's view that avoiding endorsement is "the most important goal"); L. LEVY, *supra* note 5, at 155-56 (describing O'Connor's *Wallace* concurrence as "splendidly analytical" and an "excellent opinion"); Smith, *Now is the Time for Reflection: Wallace v. Jaffree and Its Legislative Aftermath*, 37 ALA. L. REV. 345, 367 (1986) (describing O'Connor's *Wallace* opinion as "thoughtful and candid"); Paulsen, *supra* note 10, at 352 (O'Connor's proposal "has put the best light to date" on *Lemon* test); Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 162 (1984) ("Justice O'Connor at least asked the right question in *Lynch*. She asked whether nonadherents are sent a message by these practices that they are 'outsiders, not full members of the political community?'"); Lacey, *The Struggle Over Deregulation of Religiously-Affiliated Institutions: A Classic Internal First Amendment Conflict*, 26 ARIZ. L. REV. 615, 651-57 (1984) (arguing for prohibition of "symbolic aid to religion" and quoting O'Connor's proposal with approval); cf. Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 922 (1986) (indicating that government should not be allowed "to endorse or prefer one religious faith over others"); McCoy & Kurtz, *supra* note 10, at 257 (official endorsement of religion should be a "'per se' violation of the establishment clause"); Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 746 n.30 (1986) (advocating, consistent with "no endorsement" idea, elimination of "all references to God in public life"); Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 373 (1986) (advocating "no endorsement" test for public education issues).

It would be truly miraculous, of course, if *all* academic commentators were enthusiastic about the "no endorsement" proposal; and not all are. See, e.g., Tushnet, *supra* note 12, at 711-12. Moreover, many scholars who approve of the proposal disagree with O'Connor's application of the test in particular cases, such as *Lynch*. See, e.g., Tribe, *supra*, at 162.

to treat the proposed prohibition on endorsement as established law.⁴⁶ And Supreme Court majority opinions have invoked the "no endorsement" idea with approval. Recently, in *Edwards v. Aguillard*,⁴⁷ the Supreme Court quoted from O'Connor's *Lynch* concurrence, and invalidated a Louisiana statute requiring "balanced treatment" of evolution and creationism in public schools because "the primary purpose of the Creationism Act is to endorse a particular religious doctrine."⁴⁸

These approving references by the Supreme Court do not yet amount to outright adoption of the "no endorsement" test. The Court seems disposed to accept the *expansive* implications of the test, and thus to employ "endorsement" as an additional ground for finding an impermissible purpose or effect in a challenged law. However, the Court has not yet accepted the *restrictive* implications of the test;⁴⁹ it has not confirmed, for instance, that a law which does not endorse religion may be upheld even if "it in fact causes, even as a primary effect, advancement or inhibition of religion."⁵⁰ And while some opinions, particularly those written by Justice Brennan, refer to endorsement,⁵¹ others make no mention of it. Thus, despite O'Connor's contention in *Amos* that the endorsement rationale offers the most plausible justification for Title VII's exemption for religious organizations, the majority opinion, written by Justice White, appears studiously to avoid relying upon, or even alluding to, that rationale.⁵²

At present, therefore, the Court treats the "no endorsement" test as an occasional supplement to the reigning *Lemon* test, but not as a successor to, or even a definitive refinement of, that test. However,

46. See, e.g., *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561, 1563 (6th Cir. 1986) (invoking "no endorsement" test to invalidate city's placement of crèche), *cert. denied*, 107 S. Ct. 421 (1986); *Bollenbach v. Board of Educ.*, 659 F. Supp. 1450, 1465 (S.D.N.Y. 1987) (ruling that state may not assign only male drivers to school buses transporting Hasidic children because this "would undoubtedly be seen as a symbolic union of church and state, conveying a message of state support for the Hasidic religion").

47. 107 S. Ct. 2573 (1987).

48. 107 S. Ct. at 2583. See also *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 488-89 (1986) (citing O'Connor's *Lynch* concurrence with approval); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389 (1985) (describing prevention of endorsement as "a core purpose of the Establishment Clause," with citation to O'Connor's *Lynch* concurrence); *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985) (quoting O'Connor's *Lynch* concurrence with approval).

49. Thus, in *Edwards*, *Grand Rapids School Dist.*, and *Wallace*, majority opinions have invoked a prohibition against endorsement in holding laws *unconstitutional*. Except for a brief allusion to endorsement in *Witters*, 474 U.S. at 488-89, the majority has not used the endorsement rationale, as O'Connor did in *Lynch* and *Amos*, to *uphold* a law or practice.

50. *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring).

51. Brennan wrote the majority opinions in *Edwards* and *Grand Rapids School Dist.* He also employed an endorsement analysis in his dissenting opinion in *Lynch*. 465 U.S. at 701 (Brennan, J., dissenting).

52. See *Amos*, 107 S. Ct. at 2867-70.

this situation could well be transitional. If dissatisfaction with *Lemon* does not abate — and there is no indication that it will — O'Connor's "no endorsement" test seems at the moment to be the heir apparent. By offering her proposal as a "clarification" of the *Lemon* test, O'Connor has facilitated a smooth transition to the "no endorsement" approach.

Before its formal acceptance, however, the "no endorsement" test deserves more careful scrutiny than it has received thus far. Such scrutiny reveals serious problems, both theoretical and practical, with O'Connor's proposal.

II. FLAWED DOCTRINE: ANALYTICAL DEFECTS IN THE "NO ENDORSEMENT" TEST

Postponing consideration of the underlying theoretical justifications offered for the "no endorsement" test, the present section focuses upon Justice O'Connor's more practical justification for the test, *i.e.*, her contention that the test is valuable because it "clarifies"⁵³ and gives "analytic content"⁵⁴ to the *Lemon* test. The "no endorsement" test embodies four important doctrinal terms or concepts: endorsement, intent, perception, and religion. The following analysis seeks to show that each of those concepts would create serious difficulties in application — difficulties that would only serve to aggravate existing doctrinal confusion.

A. *Endorsement*

Although the central concept in Justice O'Connor's test — "endorsement" — may at first glance seem straightforward, this appearance is misleading. Endorsement connotes approval; but approval may take various forms, and it is far from certain that O'Connor's test is intended, or can sensibly be understood, to prohibit all forms of governmental approval of religion. Upon examination, therefore, the concept of endorsement seems both elusive and elastic.

1. *The Varieties of Religious Endorsement*

Consider, for instance, the following varieties of approval or endorsement.

(1) Historically, proponents of different faiths have often assumed that since religions differ in their doctrines, practices, and claims to

53. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

54. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

divine authority, not all of them could be correct;⁵⁵ among diverse religions, rather, only one could fully enjoy God's favor and approval. Thus, disputes have raged over the issue of which religion is true or divinely preferred. If government took a position in a sectarian dispute⁵⁶ by indicating that it accepted a particular religion as *the* true or divinely sanctioned faith, it would thereby endorse or approve that religion. This form of approval might be described as "exclusive preferment."

(2) Government might express a judgment that important doctrines of a religion are *true* without indicating that it believes the religion is *exclusively* true or divinely preferred. This form of approval might be described as an "endorsement of truthfulness."

(3) Without indicating any view on the truthfulness of religious doctrine, government might express a judgment that a religion, or religion generally, is *valuable* or *good* by suggesting, perhaps, that religion instills qualities of good citizenship or helps to maintain civil peace.

(4) Without indicating any view either as to religion's truthfulness or as to its value to society generally, government might acknowledge that many individual citizens care deeply about religion and that the religious concerns of such citizens merit respect and accommodation by government. This limited form of implicit approval or support⁵⁷ might be described as "accommodation endorsement."

Though not exhaustive, this list shows that the concept of "endorsement" may be understood in various senses. Intuitively, exclusive preferment seems the strongest form of endorsement and, presumably, the form most offensive to Justice O'Connor's test. At the other extreme, when one considers endorsements of value or accommodation endorsements, the issue is less clear. Except for her suggestion that some accommodations of religion should be permitted,⁵⁸ however, O'Connor has failed to specify which senses of endorsement

55. See S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 476 (1972) (describing "willingness of converts [to American sects] to regard anyone who opposed or doubted them as perdition-bound").

56. See S. MEAD, *THE OLD RELIGION IN THE BRAVE NEW WORLD* 10 (1977) ("*Sectarianism* is the claim of a group exclusively to be *the* church of Christ on earth and the only ark of salvation. A *sectarian* is one who makes this claim for his species, or sub-species, of Christianity.") (emphasis in original).

57. Supporters of a "no endorsement" test, including Justice O'Connor, sometimes treat accommodation as if it were not a form of endorsement at all. See note 70 *infra* and accompanying text. But since not *all* citizen concerns are accommodated, accommodation of religion does reflect at least limited approval. Cf. Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 797 (1984) (observing that "the purpose to accommodate religion is often not very different from the purpose to promote religion").

58. See text at notes 32-43 *supra*.

fall within her test's prohibition. As currently formulated, therefore, the test threatens to aggravate existing doctrinal confusion.

2. *Can the Concept Be Clarified?*

The foregoing criticism seemingly might be deflected by a refinement of the test; proponents might simply specify more precisely which forms of endorsement are included in the test's prohibition and which, if any, are not. But an examination of alternative constructions that might seek to refine the test shows that an attempt to specify the meaning of endorsement would create further difficulties.

a. *A blanket prohibition.* On the surface, the simplest way to achieve clarity would be to insist that *all* forms of endorsement are prohibited. Thus, even governmental actions or messages which recognize that religion has value, or which attempt to respect and accommodate the religious concerns of citizens, would be forbidden. But a sweeping prohibition applicable even to governmental accommodation of religion would force government to ignore religion and to disregard religion's distinctive interests and needs. The only permissible attitude for government to take with respect to religion, in other words, would be one of studied indifference. At the very least, this construction of the test would deviate from the prevailing view that the establishment clause does not demand "callous indifference" toward religion.⁵⁹ Moreover, in a polity in which government regularly acknowledges and accommodates citizen interests of various sorts, deliberate indifference toward one class of interests may easily shade into, and become indistinguishable from, disapproval⁶⁰ — which Justice O'Connor's test would also forbid.

If not all kinds of endorsement are to be prohibited, however, then proponents of a "no endorsement" test must explain how to distinguish between particular forms of endorsement which are permissible and other forms which are not. Such a distinction, moreover, should not be merely arbitrary; it should be supported by an explanation that tells *why* some but not other kinds of endorsement amount to a consti-

59. *Amos*, 107 S. Ct. at 2868 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). See also *Lynch*, 465 U.S. at 714 (Brennan, J., dissenting) ("Intuition tells us that some official 'acknowledgement' is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people.").

60. Justice Goldberg, while voting to invalidate prayer and Bible reading in public schools, long ago noted the possibility that an overly rigid pursuit of neutrality could lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Cf. *Cornelius*, *supra* note 10, at 36 (asserting that "government cannot be truly neutral in religious matters unless it recognizes and reasonably accommodates the religious traditions and practices of our people").

tutional evil. Possible explanations for the "no endorsement" idea will be considered later.⁶¹ But the practical difficulty may be noted here: Even if a distinction between permissible and impermissible forms of endorsement were articulated and justified on a conceptual level, application problems of the most vexing sort would nonetheless remain.

b. Exempting accommodation. Suppose, for instance, that proponents of the test adopt an "accommodation only" construction of the test, *i.e.*, one which permits governmental accommodation of religion but forbids all other forms of endorsement, including exclusive preferment and endorsements of truthfulness or value. This qualification seems consistent with what Justice O'Connor has suggested concerning the permissibility of accommodation. Unfortunately, the line separating accommodation endorsements from endorsements of truthfulness or value is so thin as to be virtually invisible. As a result, an "accommodation only" construction, in practice, must either collapse back into a flat ban on all endorsements, or else it must expand to permit endorsements of truthfulness and value.

An "accommodation only" construction implies that legislators may adopt measures assisting religion so long as the legislators are acting out of concern for the religious convictions of *their constituents*, the citizens of the nation or the state. On the other hand, if legislators adopt a similar measure that assists religion because *they* (*the legislators*) believe that religion is true or beneficial, they will probably be perceived as making — and, depending upon how the test's "intent" prong is understood, may be deemed to have intended⁶² — an endorsement of truthfulness or value. Such an endorsement would violate the "accommodation only" construction of the test. Thus, the constitutionality of a measure helpful to religion would depend upon whether the legislators acted — and were perceived as having acted — because *they* believe in religion (in which case the measure would probably be considered an invalid endorsement), or because they believe *their constituents* believe in religion (in which case the measure would be a permissible accommodation).

Beyond creating obvious problems in ascertaining legislative intent,⁶³ such a construction places inordinate weight upon a supposed

61. See sections III & IV.A *infra*.

62. Questions about the meaning of "intent" are considered in section II.B *infra*. However, the *Wallace* decision constitutes powerful evidence for a conclusion that already seems intuitively persuasive: In practice, if legislators known to hold strong religious beliefs pass laws accommodating those religious beliefs and related practices, the legislators will be deemed to have intended to endorse religion. See *Wallace v. Jaffree*, 472 U.S. 38, 56-60 (1985).

63. The problems inherent in ascertaining legislative intent are considered in section II.B *infra*.

distinction that may not even be conceptually viable. In a representative democracy, legislators and citizens are not distinct and separate categories of persons. Legislators are themselves citizens, whose own interests and beliefs are presumably entitled to be counted.⁶⁴ Even more importantly, legislators are commonly thought to be capable of representing their constituents because they share their constituents' beliefs and values.⁶⁵ Thus, the legislators' beliefs and the constituents' beliefs should often coincide. But if a legislator is viewed in this way as a "representative," *i.e.*, as one who can speak for the citizens because her beliefs and interests are "representative" of theirs, then the question of whether the legislator has acted on the basis of her own beliefs or those of the citizens seems meaningless: It is precisely by acting upon her own beliefs that the legislator "represents" the beliefs and interests of her constituents.

Thus, in attempting to clarify the "no endorsement" test by recognizing an "accommodation only" exception, proponents of the test would culminate by making a measure's constitutionality turn upon a distinction which may be nonsensical, and which in any event is not a distinction that courts can be expected to make with any degree of accuracy.⁶⁶ Proponents of the "no endorsement" test might try to tame this intractable distinction by adopting a "bright line" construction, either permissive or restrictive, of the accommodation exception. Under the permissive construction, laws adopted to accommodate citizens' religious interests and beliefs would be upheld, even though the legislators may have shared and approved such interests and beliefs. In other words, a genuine purpose of accommodation would serve to legitimate laws even though the legislators, in adopting such laws, have also approved the truthfulness or value of religious beliefs. Such a construction effectively abandons the "accommodation only" version of the "no endorsement" test, and offers government a broad li-

64. *But cf.* Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075 (1986) (arguing that government officials should not act upon religious reasons in discharging their public duties even though other citizens are free to do so).

65. Conceptions of representation are diverse, but the view that "representation means accurate resemblance," Pitkin, *The Concept of Representation*, in REPRESENTATION 11 (H. Pitkin ed. 1969), is common and intuitively appealing. Hanna Pitkin explains that this conception of representation is consistent with a position in which "[r]epresentative government is seen as a next-best substitute for direct democracy, but a substitute that needs justification. One way to justify it is to argue that the representative legislature so closely resembles the whole nation, that its actions are the same as what the nation would do." *Id.* John Adams expressed this view when he argued (contrary to the Burkean notion of representatives as trustees, which the conservative Adams might be expected to have adopted) that a legislature "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them." Letter from John Adams to John Penn, *quoted in* H. PITKIN, THE CONCEPT OF REPRESENTATION 60 (1967).

66. *Cf.* Beschle, *supra* note 45, at 174 (idea of accommodation "provides no basis for developing a clear set of standards").

cense to support religion under the guise of "accommodation."⁶⁷

At the opposite extreme, under a restrictive construction of the accommodation exception, any law which reflects approval of religious beliefs held by legislators would be deemed invalid, even when the law also serves to accommodate the religious beliefs of citizens. Under this construction, laws passed by religious legislators would be invalidated as impermissible endorsements of religion even though the same laws might be upheld if enacted by neutrally agnostic legislators conscientiously representing a religious constituency. Thus, religious legislators — or, for that matter, *anti*-religious legislators — would in effect be subject to a special disability because of their adherence or opposition to religious beliefs. This special disability would significantly burden the freedom of belief and expression of legislators — as well as penalizing their constituents.⁶⁸ In practice, moreover, this construction would be virtually equivalent to a flat ban on accommodation,⁶⁹ and would be subject to the same criticisms.

These difficulties point to the essential flaw in the "accommodation only" construction of the "no endorsement" test: The construction tacitly assumes a spurious dichotomy in which "accommodation" and "endorsement" are treated as mutually exclusive alternatives.⁷⁰ From this assumed dichotomy, it follows that if a measure can be viewed as an "accommodation" of religion, it is not an "endorsement" of reli-

67. Cf. Harvard Note, *supra* note 45, at 1638 ("The inevitable tendency of accommodationism as it is currently practiced — on an ad hoc, unprincipled basis — is towards religious favoritism, overt or covert, of mainstream religions . . .").

68. *Wallace v. Jaffree* illustrates this danger. The decision suggests that laws authorizing a moment of silence in public schools — a moment which students may use for reflection or prayer — will often be constitutional. *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (majority opinion); 472 U.S. at 62 (Powell, J., concurring); 472 U.S. at 72-73 (O'Connor, J., concurring). However, if evidence indicates that the legislators hoped that students would use the moment of silence for prayer, then an impermissible intent to endorse will be found. The result makes it difficult to escape the conclusion that in such matters the Court has imposed a special disability upon legislators who entertain and express religious beliefs and aspirations, as well as upon the constituents of those legislators. Cf. Laycock, *supra* note 18, at 23 ("If . . . evidence [of religious motivation] renders the Equal Access Act constitutionally suspect, then religious citizens are effectively deprived of their right to participate in the political process.").

69. See McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 47 ("Legislative history in an accommodation case is quite likely to reveal that the legislators who cared enough to sponsor the legislation were those who approved of the religious practice in question.").

70. Justice O'Connor does not, and likely would not, expressly assert the validity of such a dichotomy. Nonetheless, her discussions of accommodation often make sense only if such a dichotomy is presupposed. See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2875 (1987) (O'Connor, J., concurring) (asserting that "the objective observer should perceive the [statutory exemption] . . . as an accommodation of the exercise of religion *rather than* as a government endorsement of religion") (emphasis added); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) ("I believe an objective observer would perceive [Title VII's reasonable accommodation requirement] . . . as an anti-discrimination law *rather than* an endorsement of religion") (emphasis added).

gion; thus "endorsement" can serve as a limit upon "accommodation," and vice versa. But this either/or depiction is badly misleading. Far from being mutually exclusive, "accommodation" and "endorsement" of religion are much more likely to coincide.⁷¹ Asking whether a law beneficial to religion is an "endorsement" or an "accommodation," therefore, is no more sensible than asking whether a lemon is yellow or sour; the answer in each case is, "Both." Hence, the concept of "accommodation" can provide no coherent or workable limits on the kinds of endorsement that are permissible.⁷²

c. *Exempting endorsements of value.* The foregoing analysis suggests the unworkability of a construction of the "no endorsement" test which would permit governmental accommodation of religion while forbidding exclusive preferment and endorsements of truthfulness or value. But similar problems of application would afflict other possible constructions of the test. Suppose, for instance, that the "no endorsement" test were construed to permit not only accommodation but also endorsements of value, while continuing to prohibit endorsements of truthfulness. The dispositive distinction would then be between approving a faith's truthfulness and merely approving its value; government would be permitted to say that religion is "good" but not that religion is "true."

But there is no reliable way for a court to determine whether school prayer, or aid to parochial schools, or publicly sponsored nativity scenes, indicate that the religious ideas or causes they represent are "true" or merely that such ideas or causes are "good." Once again, the distinction may not even be conceptually coherent: Pragmatist philosophy denies the distinction between an idea's value and its truthfulness.⁷³ Thus, a "no endorsement" test which attempted to draw the line between endorsements of truthfulness and endorsements of value would be conceptually questionable and unmanageable in practice.

d. *Exempting endorsements of truthfulness.* The remaining alternative would be to prohibit *only* exclusive preferment, but to permit not only accommodation and endorsements of value but also endorse-

71. See McConnell, *supra* note 69, at 47.

72. This does not mean that the concept of "accommodation" itself has no value; the courts might develop independent restrictions limiting such accommodation. See McConnell, *supra* note 69, at 35-37 (suggesting guidelines for permissible accommodation). The point is simply that "accommodation" is not useful for limiting the scope of permissible "endorsement," and that the idea of "endorsement" is not useful for limiting "accommodation."

73. William James maintained that "truth is one species of good The true is the name of whatever proves itself to be good in the way of belief" W. JAMES, PRAGMATISM 75-76 (1947) (emphasis in original). Thus, James held that "[i]f theological ideas prove to have a value for concrete life, they will be true, for pragmatism, in the sense of being good for so much." *Id.* at 73 (emphasis in original).

ments of truthfulness. Under this construction of the test, government could give both material assistance and explicit praise to religion so long as it did not express a belief that any particular religion is *the* religion preferred by providence or the state. By contrast to other constructions that attempt to distinguish between permissible and impermissible forms of endorsement, this construction might well be manageable in practice. The problem is that it prohibits too little, and is therefore unlikely to appeal to supporters of a "no endorsement" test.⁷⁴

In sum, the central concept in Justice O'Connor's test — the concept of "endorsement" — is the source of serious and seemingly irresolvable ambiguities.⁷⁵ The test cannot sensibly be understood to prohibit every form of governmental approval of religion. But every attempt to refine the test by specifying that only particular kinds of endorsement are forbidden results in distinctions that are conceptually dubious and practically unworkable.

B. *Intent to Endorse*

Even if the meaning of endorsement could be adequately clarified, the question of whether government officials "intend" to endorse religion would present difficulties. Some of these are difficulties that inhere in any constitutional "intent" inquiry, while others specially afflict the "no endorsement" test.

74. This narrow construction of the test would reduce its scope even beyond that of the "no preference" test favored by Chief Justice Rehnquist and by scholars such as Robert Cord. According to "no preference" advocates, the establishment clause forbids two evils: creation of a state or national church, and discrimination among religions. See, e.g., Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POLY. 129 (1986); *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). An "exclusive preferment" construction of the "no endorsement" test would also forbid the first of these evils. But it would not necessarily preclude aid to religion which in fact benefits some religions more than others, so long as such aid did not represent that the state regards a particular religion as *the* true or divinely preferred church.

75. The uncertain meaning and scope of "endorsement" are apparent in Professor Arnold Loewy's discussion of whether the "no endorsement" test would permit public schools and universities to let student religious groups conduct activities using campus facilities on the same basis as other student groups. Loewy first observes that the question is a difficult one because such cases "require the school either to endorse or to disapprove religion." Loewy, *supra* note 45, at 1061. One page later, however, Loewy notes that allowing student religious groups to meet would be a less objectionable form of endorsement since the school would merely be acting in accordance with a neutral "open forum" policy. *Id.* at 1062. On the following page, Loewy concludes that "[m]erely providing a forum has never been thought to endorse the ideas conveyed therein." *Id.* at 1063. Thus, within three pages, Loewy appears to use the concept of "endorsement" in at least two and possibly three different senses, with shifting implications for a practice's constitutional validity. The blame for such vagarious usage is not primarily Professor Loewy's, but simply reflects the critical ambiguities within the concept of endorsement itself.

1. *The Standard Problems*

In the past, the Supreme Court has been understandably reluctant to authorize judicial inquiries into governmental intent.⁷⁶ On a purely factual level, inquiries into the intent of governmental officials are inherently treacherous; indeed, when the governmental body in question is a legislature composed of many members with complex and conflicting motives and aims, it is difficult to say whether such an inquiry is even meaningful.⁷⁷ Moreover, by making intent dispositive of a measure's constitutionality, the Supreme Court would create powerful incentives for government officials to dissemble or disguise their motives. Finally, a court undertaking a motive inquiry risks showing disrespect for the officials of other bodies or branches of government.⁷⁸

Justice O'Connor's test specifically focuses on the question of intent to endorse,⁷⁹ and thereby encounters all of the difficulties inherent in such an approach. Those difficulties are conspicuous in *Wallace v. Jaffree*, the "moment of silence" case, and in *Edwards v. Aguillard*, the "creationism" case. In *Wallace*, both the Court and O'Connor concluded that the "moment of silence" statute was intended to endorse school prayer. Although that conclusion does not seem implausible, the reasons given for the conclusion are nonetheless troubling. The majority relied heavily upon two items of evidence: post-enactment statements by the sponsor of the "moment of silence" law, State Senator Donald Holmes, and the context and background of the law.⁸⁰ The first kind of evidence attributed to the legislature as a whole an intent based upon post hoc statements of a single legislator, thus un-

76. *E.g.*, *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-85 (1968); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810). Under the fourteenth and fifteenth amendments, however, the Court does occasionally look to intent in determining the constitutionality of laws or practices. *E.g.*, *Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976).

77. For an insightful discussion of some of the conceptual difficulties, see R. DWORKIN, *A MATTER OF PRINCIPLE* 18-23 (1985).

78. In many decisions under the *Lemon* test, the Court has been able to avoid these difficulties by focusing not on *intent* but on *purpose*, and by requiring a secular purpose rather than forbidding a religious purpose. As a result, if a plausible secular reason for a challenged measure can be advanced, the Court can avoid probing the psyches of government officials. Thus, in many cases considering aid to parochial schools, the Court has found a secular purpose with little effort. *See, e.g.*, *Mueller v. Allen*, 463 U.S. 388, 394 (1983) ("Under our prior decisions, governmental assistance programs have consistently survived this [secular-purpose] inquiry even when they have run afoul of other aspects of the *Lemon* framework.").

79. Justice O'Connor talks about both "purpose" and "intent," often seeming to use the terms interchangeably. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985). The reason for this usage lies in O'Connor's view that her test is a "clarification" of the *Lemon* test, as a result of which her arguments may sometimes move back and forth between the original test and her own "refinement" of it. As refined, however, "purpose" for O'Connor evidently means "intent."

80. *Wallace*, 472 U.S. at 56-60.

derscoring the factual and conceptual problems of ascertaining the intent of a collective body. O'Connor found the use of such evidence "particularly troublesome."⁸¹ However, she was more impressed by the Court's argument that since Alabama law had already established a moment of silence for "meditation," the legislature had no conceivable reason for later authorizing a moment for "meditation or voluntary prayer" except to endorse and promote prayer.⁸²

But this argument is patently flawed. The later enactment might well have been intended, as Justice White pointed out, simply to answer a controversial question not explicitly resolved by the earlier statute, *i.e.*, to make clear that students *could* use the moment of silence for prayer if they so chose.⁸³ Moreover, the later statute did not merely add the words "or voluntary prayer" to the existing provision; unlike the earlier statute, it extended authorization for a moment of silence to grades seven through twelve. This extension could have been the statute's primary objective, with the words "meditation or voluntary prayer" added to clarify a point that the earlier statute had failed to address. In an exhibit of consummate illogic, the majority dismissed the extension to grades seven through twelve as "of no relevance" because none of the Jaffree children, on whose behalf the action challenging the statute had been brought, happened to be in those grades.⁸⁴ But even if the legislators supporting the statute knew of the Jaffree children's existence — an unlikely supposition — the statute surely was not enacted for the sole benefit of those three children; *some* Alabama children presumably were enrolled in grades seven through twelve, even if the Jaffrees were not. Thus, it was the Court's argument, not the statutory extension, that was irrelevant to the issue of legislative purpose.

The problem of disguised legislative intent was not a pressing one in *Wallace*; indeed, Senator Holmes seemingly was penalized not for dissembling but for being too candid. But the decision might well signal legislators in the future to be more cunning in their statements of purpose. Justice O'Connor noted this risk, but dismissed it with the statement that she had "little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one."⁸⁵ This expression of confidence is not reassuring, particularly because it followed a paragraph in which O'Connor emphasized that the inquiry

81. 472 U.S. at 75 (O'Connor, J., concurring).

82. 472 U.S. at 58-59 (majority opinion); 472 U.S. at 77-78 (O'Connor, J., concurring).

83. 472 U.S. at 91 (White, J., dissenting).

84. 472 U.S. at 59.

85. 472 U.S. at 75 (O'Connor, J., concurring).

into legislative purpose should be "deferential and limited," and that if a plausible secular purpose is expressed, "then courts should generally defer to that stated intent."⁸⁶ It is far from clear how a court can be expected to distinguish sham purposes from sincere ones when it is also required to "defer to . . . stated intent."

The dilemma implicit in Justice O'Connor's position regarding deference became apparent in *Edwards*. Louisiana's "creationism" statute expressly recited that its purpose was to protect academic freedom.⁸⁷ Protection of academic freedom is surely a permissible secular purpose; thus, if the Court had chosen to "defer to that stated intent," it presumably would have upheld the statute. Instead, the Court, with O'Connor's concurrence, found the stated purpose to be a "sham."⁸⁸ Whether or not this conclusion was correct,⁸⁹ it underscored another problem with "intent" tests: In invalidating a measure under such a test, a court cannot avoid expressing disrespect for the officials of other branches by attributing unconstitutional motives to them. Moreover, if those officials have asserted a proper purpose, as in *Edwards*, a court's conclusion that the stated purpose is a "sham" impugns not only the legislators' motives but also their honesty. As Justice Scalia pointed out, the implication of the Court's analysis in *Edwards* was that "the members of the Louisiana Legislature knowingly violated their oaths [to uphold the Constitution] and then lied about it."⁹⁰

2. *The Special Problems*

Beyond these frequently noted difficulties that inhere in any "intent" inquiry, the "no endorsement" test creates further complications because it does not ask simply what government *intended*; it asks what government *intended to communicate*. But many governmental measures may not have been intended to communicate anything at all. Sending messages is no doubt an important part of what government does; but it is hardly *all* — or even the most important part — of what government does. Indeed, it seems more plausible to think of legislators and executive officers as wielders of power than as mere senders of messages, and thus as primarily concerned with the substantive consequences of their acts rather than with the messages which such acts

86. 472 U.S. at 74-75.

87. LA. REV. STAT. ANN. § 17:286.2 (West 1982).

88. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2579 (1987). See generally 107 S. Ct. at 2579-83.

89. Justice Scalia strenuously contested the Court's analysis on this point. 107 S. Ct. at 2596-605 (Scalia, J., dissenting).

90. 107 S. Ct. at 2592.

may happen to communicate.⁹¹ Hence, it is possible that measures challenged under the establishment clause may have been intended to give material assistance to religious interests but not specifically to "endorse" religion. The application of O'Connor's "intent" inquiry to such measures becomes particularly problematic.

Consider the following fictitious, off-the-record exchange between an opponent of aid to parochial schools and a devout and perfectly candid legislator who has sponsored such aid.

OPPONENT: In sponsoring the parochial school aid bill, did you intend to endorse the religion that administers such schools?

LEGISLATOR: No. If I understand what "endorse" means, and I think I do, I'd have to say the answer is "no."

OPPONENT: But you *do* belong to the sponsoring religion, don't you?

LEGISLATOR: Yes, I do.

OPPONENT: And you believe in the teachings and the spiritual authority of that religion, don't you?

LEGISLATOR: Certainly.

OPPONENT: And you also believe the religion is beneficial — to individuals and to society?

LEGISLATOR: Yes.

OPPONENT: Was it on the basis of those beliefs that you supported aid to parochial schools?

LEGISLATOR: Yes, I'd say so. At least, those beliefs influenced my decision. I wouldn't support aid to church schools if I didn't think their religious influence was beneficial.

OPPONENT: Then I repeat my original question. In voting for aid, you *did* intend to endorse the sponsoring religion, didn't you?

LEGISLATOR: I can't honestly say that I did. Now let me be clear about this: I'll freely admit that I wanted to *help* the religion, to assist it. But I wasn't trying to *endorse* it. If you want to know the truth, as a legislator I prefer to stay away from publicity on religious issues. They're a can of worms, especially in a district like mine where people are divided on those issues. To be quite frank, I wish there were some

91. Justice O'Connor's emphasis upon "messages" rather than material consequences may reflect the fact that she is a judge, not a legislator or executive officer. Although Supreme Court Justices exercise coercive authority in the relatively few cases which they actually hear and decide, their broader influence lies in the messages they send, through published opinions, to the vast number of federal and state judges and other governmental officials, as well as to lawyers and the public generally. (Of course, this "message" orientation would naturally be even more congenial to legal scholars, who influence public policy, if at all, *only* through the communication of messages.)

A more cynical interpretation might see in O'Connor's emphasis upon "messages" an implicit vision of an ineffectual government composed of officials whose primary activity is posturing, and whose principal concern is to curry popularity by communicating the right messages. In an image-conscious political era, and especially during an administration presided over by a chief executive celebrated as a "Great Communicator," this vision of government is, unfortunately, not preposterous. Neither, however, is it a constitutionally mandated presupposition for first amendment doctrine.

way to get the money to the schools without letting anyone know about it, like the way Congress funds the CIA; it would arouse less controversy that way. But the church schools perform a valuable function; and at present they can't operate effectively without state help. That's the reason — the only reason — why I sponsored the bill.

OPPONENT: But I'm afraid I still don't understand. You say you didn't intend to endorse religion. But if you didn't intend to endorse religion by sponsoring the bill, then what message could you possibly have been trying to communicate?

LEGISLATOR: I wasn't trying to communicate *anything*, of course. If I'd wanted to *communicate*, or to *endorse* something, I wouldn't have sponsored a bill. I'd have proposed a resolution, or made a public statement, or written a letter to the editor. Do you think I don't know how to communicate when I want to?

The position reflected in this dialogue is not unrepresentative. To be sure, some politicians *do* seek to attract the votes of religious persons by sending messages endorsing religion. But other supporters of governmental assistance to religious interests or institutions may often attempt, if only for tactical reasons, to provide such assistance in disguised forms carefully crafted to *avoid* endorsing religion: The Minnesota school aid program,⁹² and the preparation of "creation science" textbooks carefully cleansed of explicit biblical references,⁹³ may be cases in point. In many instances, it would be disingenuous for the supporters of such measures to deny that they hope to *help*, or to *advance*, religion. But their concern — and their intent in backing such measures — is apparently to *extend material assistance* to religion, not to send messages *endorsing* religion. Asking whether such measures are intended to communicate a message of endorsement seems nonsensical; they are not intended to communicate at all.

An apologist for the "no endorsement" test might counter this objection in several ways; but none seems wholly satisfactory. The apologist might minimize the force of the objection by arguing that nearly all laws *are* intended to be communicative; communication of messages is virtually always *one* intended objective of government action, even if there are also other, and perhaps more important, substantive objectives. But this suggestion, even if correct, raises further difficulties. If a measure is intended *both* to endorse religion *and* to serve objectives other than endorsement, is it invalid under Justice O'Connor's test? Although O'Connor has not clearly answered the question, there is some indication that she would not invalidate a law unless the impermissible intent to endorse predominates.⁹⁴ If predom-

92. The program is described in *Mueller v. Allen*, 463 U.S. 388 (1983).

93. See *SCIENTIFIC CREATIONISM* (H. Morris ed. 1974).

94. In *Edwards*, O'Connor joined in a concurring opinion written by Justice Powell. Powell

inant intent is required, the problems of assessing intent are compounded: In addition to the already difficult task of deciding what a legislature intended, a court would also have to determine which among multiple intents was most influential. On the other hand, the "no endorsement" test might be construed to mean that *any* intent to endorse religion (by one legislator? a majority of legislators? a group large enough to affect the outcome?) is sufficient to invalidate a law. But such a construction is not appealing. It would require invalidation of legitimate measures merely because of tangential transgressions of the endorsement prohibition — seemingly a case of the tail wagging the dog.

Alternatively, proponents of a "no endorsement" test might try to deflect the foregoing objection by rejecting the distinction between assisting and endorsing; they might insist that an intent to *assist* religion necessarily entails an intent to *endorse* religion. This tactic, however, strains the natural meaning of "endorsement" and thereby deprives the "no endorsement" test of whatever contribution it seeks to make. In ordinary usage, "endorse" is not synonymous with "assist." I can "endorse" a political candidate (perhaps against her wishes) without giving her any assistance; my endorsement may be a positive embarrassment to her campaign. Or I can give material assistance to the candidate (an anonymous contribution, perhaps) without "endorsing" her. Even to the extent that their meanings converge, "endorsing" is a subset within the more inclusive category of "assisting"; "endorsement" describes a particular kind of assistance. Of course, ordinary usage is not sacrosanct; one might simply stipulate that for establishment purposes, all forms of assisting are deemed to constitute endorsements. But what purpose would be served by first identifying "endorsement" as the touchstone of constitutionality and then stipulating an artificial definition? If "endorsement" must be understood in a way altogether different than the way it is understood in ordinary usage, there seems little point in using the term at all. Since Justice O'Connor obviously believes the concept of "endorsement" contributes something valuable to establishment analysis, she presumably would not consent to such a sacrifice of meaning.

Finally, proponents of a "no endorsement" test might concede, either explicitly or by construing "intent" to mean "general" or "constructive" intent,⁹⁵ that the "intent" prong of the test has little in-

wrote: "A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate." 107 S. Ct. at 2585.

95. Under such a construction, government would be deemed to "intend" all of the natural consequences of its acts, even if it did not specifically desire to achieve such consequences. *Cf.*

dependent relevance to governmental measures not meant to be primarily communicative in character, and that such measures must stand or fall upon the "perception" prong of the test.⁹⁶ But this understanding of the test has drawbacks of its own. In the first place, if "endorsement" connotes a communication of approval, why would outside observers perceive endorsement in a measure that was not intended to communicate anything? Justice O'Connor suggests an answer to this question by distinguishing between the "subjective" and "objective" meanings of a statement. The "subjective" meaning is what the speaker intends, and may be determined not only from the statement itself, but from other evidence such as context or personal examination of the speaker. But many hearers may not have access to such extrinsic evidence of intent, and they may thus be forced to ascertain the speaker's intent solely on the basis of the statement itself. These hearers may thus apprehend a meaning different than what the speaker intended. O'Connor refers to this other meaning as the "objective" meaning of the statement.⁹⁷ Applied to measures not intended to be communicative, this analysis suggests that outside observers might perceive communicative intent in an action even though government officials had no such intent.

On a factual level, O'Connor's analysis is perfectly plausible; citizens may often misperceive what government officials intend. One consequence of this analysis, however, is that the validity or invalidity of measures intended to assist but not endorse religion becomes wholly dependent upon *misperceptions*; such measures would be struck down only if citizens, or an "objective observer," would attribute to government officials a communicative intent which they did not in fact have. A doctrine which formally adopted misinformation and misperceptions as the standard for determining the constitutionality of a potentially broad array of public measures would seem, to put it mildly, anomalous.⁹⁸ Moreover, whether O'Connor's hypothetical "objective observer" could make such a false attribution of communicative intent

W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 35 (5th ed. 1984) ("The actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence."). Government would be deemed to have intended an endorsement in precisely those instances in which an endorsement would, in the natural course, be perceived. See text following note 109 *infra*.

96. Justice O'Connor's statement in *Wallace* that "the secular purpose requirement alone may rarely be determinative in striking down a statute," 472 U.S. at 75, suggests that she might favor this construction.

97. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

98. Cf. *Greenawalt*, *supra* note 57, at 795 n.166 (suggesting that "mistaken public perceptions . . . should not determine the outcome of cases").

seems doubtful.⁹⁹ If it could not, then measures intended to assist but not endorse religion would simply be immune to establishment review. Courts are not likely to embrace such a result, but the effort to avoid it would put undue pressure on the already shaky concept of "intent to endorse."

C. *Perceptions of Endorsement*

The second prong of Justice O'Connor's test, which forbids laws or practices that create a *perception* that government has endorsed or disapproved of religion, generates further analytical problems. By making perceptions an independent ground for invalidating a law, the second prong raises a critical question: Whose perceptions count?¹⁰⁰

Justice O'Connor has suggested two different answers to that question. In *Lynch*, she implied that the relevant perceptions would be those of real human beings — the actual flesh-and-blood citizens of Pawtucket, or perhaps of the nation as a whole.¹⁰¹ This answer, however, raises insuperable problems. If *any* citizen's perception that a governmental action endorses or disapproves of religion were sufficient to invalidate the action, then the result would be governmental paralysis; religious diversity in this country is sufficiently broad¹⁰² to ensure that almost anything government does will likely be seen by someone as endorsing or disapproving of a religious viewpoint or value.¹⁰³ On

99. See notes 108-09 *infra* and accompanying text.

100. Cf. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985) (In *Lynch*, "the Court dispensed at a stroke with what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and nonbelievers that they are heretics, or at least not similarly worthy of public endorsement?") (emphasis in original).

101. 465 U.S. at 690 (O'Connor, J., concurring).

102. In addition to the diverse Christian, Judaic, Bahai, and Islamic denominations or faiths, the last several decades have witnessed the appearance in this country of a large number of "New Religions." See M. MARTY, *A NATION OF BEHAVERS* 126-57 (1976). More than a decade ago, historian Martin Marty offered the following list of "New Religions": "Hinduism, Buddhism, Sufism, the Occult, Zen, Baba-lovers, Subud, Transcendental Meditation, Tibetan religion, astrology, reincarnation, nature religions, esotericism, drug-associated religion . . . Rosicrucians, Spiritualism, Theosophy, New Thought . . . I Am, Unidentified Flying Objects Cults, Guardjeff [sic] Groups, the Prosperos, Scientology, Abilitism, Builders of the Adytum, the Church of Light, Neo-Pagan groups, Vedanta Societies, the Self-Realization Fellowship, the International Society for Krishna Consciousness, Nichiren Shoshu, and many subspecies." *Id.* at 126-27. Marty did not claim that his list was exhaustive, and it has doubtless grown longer since 1976.

103. Recent case law provides evidence for this proposition. For instance, some parents find a series of widely used school textbooks offensive to their religion because the books are thought to communicate feminist, pacifist, and humanist values. See *Mozert v. Hawkins County Pub. Schools*, 647 F. Supp. 1194, 1199 (E.D. Tenn. 1986). On the other hand, many other citizens apparently do not find such values offensive, and might well view removal of the challenged books from the curriculum as endorsing the religious views of the objectors. Hasidic parents and school children object to the assignment of female drivers to school buses, but if the state responds by assigning only male drivers to those buses, others may see the action as endorsing the Hasidic religion. See *Bollenbach v. Board of Educ.*, 659 F. Supp. 1450, 1464 (S.D.N.Y. 1987).

the other hand, to say that the perception must be that of a majority, or of some designated group of citizens, seems unacceptable. Such a standard, besides creating additional factual questions about what a majority perceives, would offend the central principle of Justice O'Connor's own test by establishing as definitive, and thereby endorsing, the religious viewpoint of a majority or other designated group while discounting the religious perspective of minorities or outsiders.¹⁰⁴

The other general kind of answer to the question of whose perceptions count would reject the perceptions of actual citizens as a controlling standard, and instead would adopt the perceptions of a fictitious, judicially created observer. Since *Wallace*, Justice O'Connor has adopted this course. The dispositive question, in her view, is not factual but legal; the question is whether a law or practice would be perceived as endorsement by a hypothetical "objective observer."¹⁰⁵

However, in avoiding one set of problems, O'Connor encounters another. In the first place, a purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive; and there is no empirical touchstone or outside referent upon which a critic could rely to show that the author was wrong. The most that could be said in a given case is that the "objective observer's" percep-

In *Bowen v. Roy*, 476 U.S. 693 (1986), the plaintiffs asserted that the government's use of Social Security numbers in administering welfare programs violated their religious beliefs. Under current doctrine, this assertion took the form of a free exercise claim entitling the objectors at most to individualized treatment, but if the perception of endorsement or disapproval by any citizen were sufficient to indicate an establishment violation, the administration of the program as a whole conceivably might be subject to challenge. Finally, sodomy statutes, such as the one upheld in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), pose an obvious dilemma for an endorsement analysis. Many observers may view such statutes as reflecting and endorsing the view of, for instance, Fundamentalist Christians that homosexuality is biblically prohibited and morally wrong. Conversely, some Fundamentalist Christians would undoubtedly perceive the repeal or invalidation of such statutes as reflecting disapproval or rejection of their religious beliefs.

104. See Harvard Note, *supra* note 45, at 1648 ("If the establishment clause is to prohibit government from sending the message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received by the minority or nonadherent.") (emphasis in original). Cf. Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 863, 868 (1986) (asserting that the "key objective" of the establishment clause is "to safeguard minorities and outsiders with respect to religious beliefs").

105. See notes 30-32 *supra* and accompanying text. This may seem tantamount to saying that the dispositive perceptions are those of Supreme Court Justices themselves. But it is unlikely that Justice O'Connor would actually formulate the test in this way. If perceptions of the Supreme Court were adopted as the standard, then in striking down a statute under the "perception" prong of the test, the Court would in essence be saying to the legislature: "Even though we do not find (under the first prong) that you *intended* to endorse religion, the law you enacted is nonetheless invalid because we, the Justices, *perceive* it as an endorsement of religion." It is hard to make sense of such an assertion; if the Justices believe no endorsement was intended, then *they* at least should not perceive the law as an endorsement (although they might recognize that *someone else* would so perceive it). Thus, at least in form, the controlling perceptions must be those of someone other than the Supreme Court.

tions are remarkably unlike those of most real human beings. But that criticism is of doubtful force, because the adoption of a fictitious observer as the standard represents a deliberate decision that the perceptions of real human beings should not control. Thus, O'Connor's adoption of a fictitious perceiver drains the test's perception prong of whatever truly objective content it otherwise might have;¹⁰⁶ and it thereby reduces the test's capacity to provide guidance to governmental officials or to lower courts, as well as the possibility for critical evaluation of a court's application of the test.¹⁰⁷

Furthermore, the adoption of an "objective observer" standard logically tends to bring about the collapse of O'Connor's second prong into her first prong. Though disembodied, Justice O'Connor's observer hardly operates behind a veil of ignorance. A principal advantage of a fictitious observer, rather, is that its perceptions need not be subject to the limitations which afflict mere mortals.¹⁰⁸ Thus, unlike most ordinary citizens, the "objective observer" is said to be familiar with the text, legislative history, and implementation of the statute under review.¹⁰⁹ All of this comes very close to saying that the observer knows the legislators' objectives in adopting the law — or, in

106. Although generally favorable to the "no endorsement" test, William Marshall finds the "objective observer" standard "incomprehensible. Is the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view?" Marshall, *supra* note 45, at 537. Marshall's own attempt to overcome this problem by specifying the appropriate perspectives is considered at notes 216-28 *infra* and accompanying text.

107. O'Connor's fictitious "objective observer" may seem analogous to the hypothetical "reasonable person" who has served tolerably well as a standard in tort law. But the "reasonable person" standard functions in tort law as an open-ended device for turning over to juries, in the guise of issues of fact, questions that cannot and need not be answered in any uniform way. See Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 294-303 (1984). O'Connor envisions no similar function for her "objective observer." She does not want the question of perception to be treated as an issue of fact, and she has shown little deference to the factual findings of lower court judges on this issue. See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2875 (1987) (O'Connor, J., concurring) (perception prong raises question of law, not of fact); *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring) (treating perception as question of law and rejecting district court's finding that crèche was perceived as endorsing Christianity).

108. As noted, for instance, O'Connor has suggested that the "objective observer" is possessed of a good understanding of the nature and scope of the values embodied in the free exercise clause — an understanding which seemingly would surpass anything the Supreme Court or academic commentators have thus far achieved. See Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 779 (1986) (observing that "free exercise jurisprudence . . . rests on values we have seldom tried to state, much less justify").

109. See *Amos*, 107 S. Ct. at 2874 (O'Connor, J., concurring); *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring). By endowing the "objective observer" with such knowledge, Justice O'Connor silently but effectively dissolves the distinction made in *Lynch* between "subjective" and "objective" meanings. The possibility of an "objective" meaning which diverges from "subjective" meaning was said to arise, after all, precisely because real human beings perceiving government actions often do not have access to such extrinsic evidence of the intended, "subjective" meaning. See text at note 97 *supra*.

other words, that the observer knows what the legislators intended. Indeed, this conclusion seems inescapable. In applying the test's first prong, after all, judges must determine whether legislators intended to endorse religion; and surely the "objective observer," who is privy to the same information, can ascertain at least as much. Thus, the judge who examines the text, background, and implementation of a law and concludes that the law was not intended to endorse religion should rule that an "objective observer" examining the same factors would draw the same conclusion. To rule otherwise would be to confess that the judge is not being "objective."

But if the "objective observer" knows what the legislators intended, then the observer will perceive endorsement in all those instances, and only in those instances, in which the judge believes an intent to endorse exists. Of course, the observer might recognize that other perceivers — real human beings not blessed with the observer's knowledge of text, legislative history, and implementation — will sometimes perceive an intent to endorse even when none exists. But the perceptions of such other mortal perceivers no longer controls; that, after all, is why the "objective observer" was created. To the "objective observer," intent and perception will inevitably coincide. Thus, the two prongs of the test cease to operate independently, but instead dissolve into each other.

Far from being a flaw in the test, such a reduction, at least if it were acknowledged, might seem to be a victory for simplicity. The problem is that a focus either upon legislative intent or upon the fictitious perceptions of a disembodied observer diverges from the purpose which Justice O'Connor attributes to the "no endorsement" test. As noted, O'Connor has explained that the "no endorsement" test seeks to prevent government from sending messages which lead some citizens to believe that they are "outsiders" because of their religious beliefs.¹¹⁰ If that is the purpose of the test, however, then the pertinent fact controlling the application of the test should be neither the perhaps indiscernible intent of government officials nor the imagined perceptions of a fictitious observer; the controlling standard, rather, should be the actual perceptions of real citizens. If citizens in fact perceive that government is endorsing or disapproving of religion, then they may feel like "outsiders," even though the legislators intended no such consequence (and even though a hypothetical "objective observer" would suffer no similar sense of exclusion). Conversely, if citizens do not in fact perceive an endorsement of religion, then they

110. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring).

are not made to feel like "outsiders" because of their religion regardless of what legislators may have intended, or what an "objective observer" might perceive. Thus, the content of Justice O'Connor's test does not correspond to its ostensible purpose.

Hence, there seems to be no satisfactory response to the question of whose perception should count. One may attempt to answer that question either by enthroning the perceptions of actual citizens or by constructing an artificial perceiver, as O'Connor does; but either response generates serious practical and theoretical problems of its own.

D. Religion

Although the difficulty of defining "religion" is hardly unique to the "no endorsement" test, the test threatens to aggravate the difficulty. Both the *Lemon* test and the establishment clause itself use the term "religion," and one might therefore suppose that courts could not decide establishment cases without first defining what "religion" means. But the Supreme Court has in fact had little to say on the subject.¹¹¹ By contrast to many legal questions that are answerable conceptually but difficult to resolve in practice, the question of what "religion" means is daunting on a conceptual level,¹¹² but has posed remarkably few problems in actual cases. It is necessary to consider how this fortunate state of affairs has come to exist and whether adoption of a "no endorsement" test would alter it.

1. Defining "Religion" Under Existing Doctrine

Although the definition of religion has rarely been troublesome in establishment cases,¹¹³ the question has created greater difficulty in free exercise cases.¹¹⁴ The more frequent occurrence in free exercise

111. The Court's limited pronouncements on the meaning of religion are discussed in Greenawalt, *supra* note 57, at 759-61.

112. The vast diversity of religions and religious beliefs, *see* note 102 *supra*, has led scholars to doubt the possibility of formulating any satisfactory definition of "religion"; some scholars have urged the Court not to attempt the task. Phillip Johnson asserts that "[t]he fact is that no definition of religion for constitutional purposes exists, and no satisfactory definition is likely to be conceived." Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 832 (1984). *See also* Freeman, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1548 (1983) (suggesting that the question be answered by looking for "family resemblances" rather than by declaring a definition); Greenawalt, *supra* note 57, at 762-76 (advocating an analogical rather than definitional approach).

113. In most cases, the religious nature of the institution or interest at issue has not been controversial. *But cf.* *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (concluding after lengthy analysis that Transcendental Meditation is religion under the establishment clause).

114. For instance, in *Welsh v. United States*, 398 U.S. 333 (1970), the Supreme Court struggled with the question of whether an ethical objection to war could be considered "religious." Although the majority treated the question as one of statutory construction, Justice Harlan pointed out that the construction was severely strained and concurred on free exercise grounds.

cases of disputes about what counts as "religion" seems to result from two differences between the clauses: viewpoint and standing.¹¹⁵

a. Viewpoint. Some citizens may consider a particular institution or interest to be religious even though government officials do not. The question of viewpoint asks whose perspective should control. Although the issue is seldom addressed explicitly, establishment decisions tacitly adopt the viewpoint of the government.¹¹⁶ The free exercise clause, by contrast, focuses upon the individual's perspective. If free exercise is designed to safeguard conscience, or to spare individuals the painful choice of either breaking the law or violating their religious duty, it makes no sense to adopt *government's* view of what conscience and religious duty demand; the *individual's* perspective must provide the standard.¹¹⁷

The choice of viewpoint, of course, does not supply a definition telling what "religion" means, but the choice strongly influences the frequency with which that question is thrust upon the courts. There are certain institutions, practices, and beliefs — the Catholic Church, prayer, and the Apostles' Creed, to mention some obvious examples —

398 U.S. at 344-67 (Harlan, J., concurring); see also *Africa v. Commonwealth*, 662 F.2d 1025, 1034 (3d Cir. 1981) (rejecting claim that MOVE, described as a "revolutionary" organization "absolutely opposed to all that is wrong," is a religion); *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969) (ruling after considerable discussion that Hubbard Electrometers, or "E-Meters," are part of religious practice); *United States v. Kuch*, 288 F. Supp. 439, 444-45 (D.D.C. 1968) (rejecting claim that Neo-American Church, devoted to drug use, is a genuine religion); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (ruling that use of peyote is bona fide religious practice of Native American Church); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957) (concluding after lengthy analysis that Fellowship of Humanity is religion despite lack of belief in Supreme Being).

115. Some commentators might account for the difference by arguing that "religion" has — or should have — a broader meaning in free exercise cases, so that courts must decide more frequently whether borderline cases involve "religion." See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 826-33 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). However, the Supreme Court has not thus far accepted the proposition that "religion" should be given different definitions in the establishment and free exercise clauses.

116. This choice of viewpoint is evident in decisions which, after attributing a legitimate secular objective to government, uphold a practice or law even though the law's objective would be viewed as religious by some people. See *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (rejecting establishment challenge to law restricting abortion funding); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing law). If the establishment clause is viewed primarily as a prohibition forbidding improper exercises of governmental power, rather than as a shield protecting individual rights, then government's vision of what it is trying to do seems to be the relevant perspective.

117. Professor Laurence Tribe asserts that "when free exercise issues are raised, religious claims are to be examined not in terms of the majority's concept of religion but in terms of the social function of the group, or in terms of the role the beliefs assume in the individual's life." L. TRIBE, *supra* note 115, at 831. But cf. BeVier, *The Free Exercise Clause: A View From the Public Forum*, 27 WM. & MARY L. REV. 963, 973 (1986) (tentatively suggesting that it would be preferable to "look[] at the free exercise clause principally as a constraint on lawmaking power instead of principally as a guarantor of a certain quantum of individual liberty").

which nearly everyone would regard as religious; and there are other institutions, practices, and beliefs — for example, the Aryan Nations Church, Transcendental Meditation, and ethical objection to military service — which are controversial or borderline cases. To the extent that litigation affects institutions or interests which nearly everyone regards as religious, borderline cases and the problem of definition need not be addressed. The adoption of the government's viewpoint in establishment cases takes advantage of such areas of consensus, because government's views regarding what is "religious" and what is "secular" are likely to correspond to conventional views held by people in the community. Thus, government and most citizens are likely to agree that parochial schools have a "religious" component, and that increasing economic prosperity is a "secular" objective. Some people may see such matters differently, but there is generally no need, under current establishment doctrine, to grapple with unorthodox viewpoints.

Conversely, by adopting the viewpoint of individuals objecting to government practices, free exercise decisions are more likely to bring unconventional perspectives to the forefront. There is no general consensus that the taking of hallucinogenic drugs,¹¹⁸ or the use of "Hubbard Electrometers,"¹¹⁹ are religious exercises; but some people believe they are, and the believers' perspective is critical in free exercise cases. Such cases are thus more likely to involve courts in exploring the boundaries of what can be considered "religion."

b. Standing. A second difference between the establishment and free exercise cases concerns the kind of injury needed to confer standing to sue. The Supreme Court has ruled that mere awareness of a constitutional violation does not qualify as such an injury;¹²⁰ and this limitation may pose problems for prospective plaintiffs seeking to assert establishment challenges. The principal kind of evil against which the establishment clause protects is institutional, not individual. Governmental action violating the clause generally involves some form of support for religion. But the religion so benefited is not injured, and in any event is unlikely to complain about such support; and nonadherents to the religion may be hard pressed to show any concrete injury which they personally have suffered. Aware of this difficulty, the courts have in some instances relaxed standing requirements — by allowing taxpayer standing, for instance — to permit establishment

118. See *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

119. See *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969).

120. See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974).

challenges that otherwise might never reach the courts.¹²¹ Recently, however, the Supreme Court has been little inclined to grant such indulgences.¹²² As a result, persons holding borderline or idiosyncratic views of "religion" may be unable to challenge government practices on establishment grounds.

Conversely, if such persons are not merely offended by government's support for what they regard as religion, but are actually inhibited in exercising their own religious beliefs, they will likely have standing to complain on free exercise grounds.¹²³ Inhibition in the exercise of one's religion is precisely the kind of injury that the free exercise clause is designed to prevent.¹²⁴ By so defining the nature of the cognizable injury, therefore, free exercise doctrine is more likely to confer standing upon persons who hold unconventional views of what is "religion," and who may therefore force the definitional issue upon the courts.

These differences in viewpoint and standing help to explain why the Supreme Court has been able largely to avoid the problem of defining religion in establishment cases. One might wisely hope that this situation will continue. Fashioning a general definition of religion seems virtually impossible;¹²⁵ thus, forcing courts to address the definitional issue would almost certainly add one more source of confusion to establishment doctrine.¹²⁶

121. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968) (permitting challenge to parochial school aid on basis of taxpayer standing).

122. E.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (distinguishing *Flast*, and denying taxpayer and citizen standing in establishment clause case); see also *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (rejecting board member's standing in individual, official, and parental capacities to appeal from lower court decision requiring school to permit student prayer club to meet during activity periods).

123. In theory, inhibition of religion may also implicate the establishment clause. But although the *Lemon* test purports to forbid measures whose principal effect either advances or inhibits religion, Professor Laycock points out that the "inhibition" provision of *Lemon* is analytically out of place, and that the Court has never applied it in an actual holding. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380-85 (1981).

124. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981).

125. See note 112 *supra*.

126. It might seem that there is little point in avoiding definitional questions in establishment cases if the same questions will still have to be addressed in free exercise cases. But the consequences of answering such questions in free exercise cases is often less far-reaching. Unlike establishment challenges, which if successful may lead to the general invalidation of a law or the general elimination of a practice, free exercise cases usually involve claims for a special exemption from a law or regulation. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying exemption from military dress code); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting exemption from compulsory education requirement). See generally Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985 (1986). Because in a free exercise case no general invalidation is sought, no general definition of religion is required; it

2. Defining "Religion" Under the "No Endorsement" Test

Adoption of a "no endorsement" test, however, is likely to have just that effect. The test would introduce the free exercise features of viewpoint and standing into establishment doctrine, thereby multiplying the occasions in which courts may become embroiled in troublesome definitional issues.

a. Viewpoint. The "no endorsement" test, by mandating invalidation of laws creating a "perception" that government has endorsed religion, introduces a nongovernmental viewpoint into establishment doctrine. In incorporating outsiders' perceptions that religion is being endorsed, the test also incorporates outsiders' conceptions of what "religion" is. Thus, a challenged law would have to survive tests employing both the governmental viewpoint (under the "intent" prong) and a nongovernmental viewpoint (under the "perception" prong).

To be sure, the test's nongovernmental viewpoint might not include the perspectives of persons holding unconventional or idiosyncratic views of religion, since their perspectives might not correspond to those of Justice O'Connor's "objective observer." Still, in ruling that an "objective observer" would not regard the object of a particular governmental endorsement as religious, a judge would likely be confronted with the argument that some members of the community *do* regard the object as religious. And in responding to that argument, a responsible judge would inevitably be forced to explain the reasons why he, or the "objective observer," declined to adopt those citizens' conception of "religion."¹²⁷ Thus, even if the "no endorsement" test's perception prong does not actually encompass unconventional views held by members of the community, it would force courts to respond to those views, and thus to become involved in definitional issues about religion.

b. Standing. Justice O'Connor has not expressly addressed the question of standing under her proposed test, but the logic of her proposal prescribes a much broader eligibility to sue. Under existing establishment doctrine, the evil to be prevented is improper governmental support for, or entanglement with, religion. Thus, the clause is primarily concerned with maintaining proper institutional relations. O'Connor's analysis, by contrast, reconceives the purpose of the establishment clause as individual rather than institutional. Her

is enough to decide that the particular plaintiff sincerely regards an interest or belief as religious. Establishment decisions are not so easily limited.

127. This problem is implicit in *Lynch*; it does not become conspicuous there simply because Justice O'Connor's opinion makes scant effort to confront directly, or to show the errors of, the views of Jews and others who see the crèche as a religious symbol. See note 132 *infra*.

proposal aims to prevent government from sending messages which make some citizens feel like "outsiders" because of their nonadherence to particular religious beliefs.¹²⁸ A person who perceives that a law endorses a religious belief which he does not accept, and who thus feels like an "outsider," has suffered precisely the kind of injury that the establishment clause, in O'Connor's view, is designed to prevent; and he should therefore have standing to challenge the law.

Indeed, the logic of O'Connor's position would exceed free exercise doctrine in conferring standing to sue. Under the free exercise clause, a plaintiff generally must show that the law or practice in question imposes a "substantial" or "severe" burden on the exercise of her religion.¹²⁹ But if the evil prevented by the establishment clause is the sending of messages which make citizens feel like "outsiders," as O'Connor contends, an establishment clause plaintiff logically should not be required to allege a "substantial" or "severe" burden on *the exercise* of his religion. It should be sufficient, rather, to assert that he feels like an "outsider" because of some governmental message touching upon religion.

Thus, the conception of injury embodied in Justice O'Connor's test offers an expansive license for dissatisfied citizens holding unconventional views of religion to challenge government policy on religious grounds. In doing so, her conception also increases the likelihood that courts will be forced to struggle with definitional questions about what "religion" means. Such a development is not calculated to improve the clarity and consistency of establishment jurisprudence.

E. *The Fruits of Incoherence*

The foregoing analysis has suggested that the "no endorsement" approach is riven by ambiguities and analytical flaws. These problems in the approach are not merely academic; their effect is to render the "no endorsement" test ineffectual as a doctrinal tool. Because the test is composed of unmanageable or fatally ambiguous concepts, it cannot provide the needed predictability or guidance for lower courts and other government officials. Although the Court has not actually adopted the "no endorsement" test, a comparison of the analyses of particular controversies advocated by Justice O'Connor and by others

128. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

129. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (striking down Indiana law which denied unemployment compensation to Jehovah's Witness who refused to work in arms factory because law put "substantial pressure on an adherent . . . to violate his beliefs"); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (noting, in exempting Amish from compulsory school attendance, that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable").

who also favor a "no endorsement" approach demonstrates that the "no endorsement" test would not provide clarity or predictability to establishment jurisprudence.

Lynch itself supports this criticism. Justice Brennan argued in dissent that a city's inclusion of a crèche in a publicly sponsored Christmas display constitutes an endorsement of Christianity.¹³⁰ Commentators have generally agreed.¹³¹ To the extent that empirical evidence has any bearing upon the question, the evidence would seem to support the argument of the dissent: At least some citizens evidently perceived the city's inclusion of a crèche in the Christmas display as an objectionable endorsement of religion.¹³² Nonetheless, Justice O'Connor, the test's author, concluded that the city's use of the crèche reflected no intent to endorse Christianity and would not create perceptions of such endorsement.

Further evidence of the test's indeterminate character appears in a recent article written by Professor Arnold Loewy. Loewy likes the "no endorsement" test.¹³³ In applying that test to particular controversies, however, he concludes that Pawtucket's sponsorship of a nativity scene violated the establishment clause,¹³⁴ that Alabama's "moment of silence" law probably did *not* violate the clause,¹³⁵ and that ceremonial invocations of deity, such as those occurring in the Pledge of Allegiance or the opening of a Supreme Court session, *do* violate the "no endorsement" test.¹³⁶ In each instance, Justice O'Connor would disagree.¹³⁷ Thus, Professor Loewy and Justice O'Connor, while purporting to apply the same test, would regularly reach precisely opposite conclusions in a wide range of controversies. Such disparate conclusions underscore the analytical deficiencies which destroy the test's usefulness as a practical doctrinal tool.

130. 465 U.S. at 701 (Brennan, J., dissenting).

131. See, e.g., Tribe, *supra* note 100, at 611; Loewy, *supra* note 45, at 1065.

132. The plaintiffs in the case all perceived the crèche "as demonstrating the City's support for the Christian religion." *Donnelly v. Lynch*, 525 F. Supp. 1150, 1157 (D.R.I. 1981), *aff'd.*, 691 F.2d 1029 (1st Cir. 1982), *rev'd.*, 465 U.S. 668 (1984). More generally, Justice O'Connor's conclusion that the crèche did not endorse religion "came as a surprise to most Jews." Tushnet, *supra* note 12, at 712 n.52. Leo Pfeffer asserts that the crèche was offensive not only to Jews but also to the National Council of Churches, Baptists, Unitarians, and to "Ethical Culturalists, and secularists." L. PFEFFER, *supra* note 15, at 120.

133. Loewy, *supra* note 45, at 1050-51.

134. *Id.* at 1065.

135. *Id.* at 1068.

136. *Id.* at 1055-58.

137. O'Connor concurred, as described above, in the results in the crèche and moment of silence cases. She has indicated that ceremonial invocations of deity on coins and in the opening of a Supreme Court session are permissible. *Lynch*, 465 U.S. at 693.

III. DEFECTIVE THEORY: INADEQUATE JUSTIFICATIONS FOR THE "NO ENDORSEMENT" PRINCIPLE

The foregoing analysis suggests that the "no endorsement" test is unlikely to improve upon *Lemon* as a formulation of workable doctrine. But courts and lawyers are all too used to working with imperfect doctrine; thus, the doctrinal shortcomings of the "no endorsement" test might be excused if powerful theoretical justifications for the test could be produced. This section analyzes several likely justifications for a "no endorsement" principle, including the theoretical rationale proposed by Justice O'Connor. The section concludes that far from providing grounds for indulging the test's practical flaws, the justifications are themselves vitiated by analytical defects that cast further doubt on the "no endorsement" proposal.

A. *Is the "No Endorsement" Principle Self-Evident?*

The analysis in this section asks whether the central proposition contained in Justice O'Connor's proposal, *i.e.*, the proposition that government should be constitutionally precluded from endorsing or disapproving of religion, can be justified. To some, however, that central proposition may seem axiomatic or self-evident — and thus neither in need of nor susceptible of further justification.¹³⁸ But this position is unpersuasive. Governmental endorsement of religion has a long history in this country. From the Continental Congress¹³⁹ through the framing of the Bill of Rights¹⁴⁰ and on down to the present day, government and government officials — including Presidents George Washington, Abraham Lincoln, and, of course, Ronald Reagan, not to mention the Supreme Court itself¹⁴¹ — have frequently expressed approval of religion and religious ideas.¹⁴² Such history may not prove that governmental approval of religion is constitution-

138. See, e.g., McCoy & Kurtz, *supra* note 10, at 257 (asserting without supporting justification that endorsement is a "per se" violation of the establishment clause).

139. Thomas Curry notes, for instance, that the Continental Congress "sprinkled its proceedings liberally with the mention of God, Jesus Christ, the Christian religion, and many other religious references." T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 217 (1986).

140. Shortly after approving the Bill of Rights, which of course included the establishment clause, the first Congress resolved to observe a day of thanksgiving and prayer in appreciation of "the many signal favors of Almighty God." *Id.*

141. See, e.g., *Zorach v. Clausen*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (asserting that "this is a Christian nation").

142. See generally Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

ally proper.¹⁴³ But the history at least demonstrates that many Americans, including some of our early eminent statesmen, have *believed* such approval was proper. That fact alone is sufficient to show that the "no endorsement" principle is controversial, not easily self-evident.

Indeed, far from being self-evident, the "no endorsement" principle when viewed in context seems positively counterintuitive. Despite occasional calls for "strict separation" or "strict neutrality," virtually everyone concedes that some beneficial interactions between government and religion are allowable; even the self-professed absolutists who dissented in *Everson v. Board of Education* agreed that the state should at least extend police and fire protection to churches.¹⁴⁴ Thus, the critical question asks what criteria should be used to distinguish between those beneficial interactions that are permissible and those that are impermissible. Many establishment decisions have focused on the kind or extent of *actual material benefit* conferred on religion: Does the law at issue "have as a principal or primary effect the advancement or inhibition of religion?"¹⁴⁵ By contrast, Justice O'Connor's test discards actual material benefit as the governing criterion and instead looks primarily to the *message* that a law conveys. It is natural, and only partially misleading, to conclude that "O'Connor seems to be saying that appearance supercedes reality."¹⁴⁶

Viewed in this way, however, the "no endorsement" principle is not axiomatic. On the contrary, it would hardly seem implausible to suggest that O'Connor has things exactly backwards: Government should not bestow *actual benefits* upon religion, it might be argued, but "mere" endorsement of religion is thoroughly in keeping with our traditions. Thus, proponents of a "no endorsement" approach to the establishment clause cannot rest on the assumption that their position is self-evident; they must be prepared to argue for it.¹⁴⁷

143. Cf. Laycock, *supra* note 45, at 913 ("The argument cannot be merely that anything the Framers did is constitutional. . . . Of course the state and federal establishment clauses did not abruptly end all customs in tension with their implications. No innovation ever does.").

144. *Everson v. Board of Educ.*, 330 U.S. 1, 60-61 (1947) (Rutledge, J., joined by Frankfurter, Jackson, and Burton, JJ., dissenting).

145. This inquiry constitutes the second prong of the *Lemon* test and has thus been used in hundreds of decisions.

146. Gibney, *State Aid to Religious-Affiliated Schools: A Political Analysis*, 28 WM. & MARY L. REV. 119, 144 n.164 (1986). The conclusion is partially misleading because appearances and symbols are part of, and not simply images of, the overall reality in which citizens live.

147. In unguarded moments, even Justice O'Connor herself seems instinctively to reject her own approach. Perhaps the clearest test cases for the "no endorsement" proposal would be instances in which government verbally endorses, but gives no material assistance to, religion. Purely ceremonial public references to deity or religion seem to present such test cases, and in those cases O'Connor finds no constitutional infirmity. See *Lynch*, 465 U.S. at 693 (O'Connor, J.,

B. *The Divisiveness Argument*

A second theoretical justification might assert that a "no endorsement" principle serves to prevent division along religious lines.¹⁴⁸ Justices and scholars have divided over whether prevention of religious division should be a governing policy in establishment analysis.¹⁴⁹ Even if potential divisiveness is a proper and substantial constitutional concern, however, the connection between that concern and a "no endorsement" principle is tenuous at best. To be sure, governmental endorsement of religion may be divisive. By the same token, however, governmental *refusal to endorse* religion may be divisive. Indeed, if more than a few citizens believe that government *should* approve or support religion in some way, then a refusal by government to provide such approval or support may engender more contention than the approval itself would provoke.¹⁵⁰ *Lynch* is a case in point. Although Pawtucket's sponsorship of the crèche manifestly offended some of the city's citizens, *i.e.*, the plaintiffs, the attempt to remove the crèche generated an even greater wave of opposition and hostility; the mayor testified that he had "never seen people as mad as they are over this issue."¹⁵¹ Nor is the Pawtucket experience atypical.¹⁵²

Thus, adoption of a "no endorsement" principle would not end

concurring). Similarly, presidential proclamations calling for public prayers of thanksgiving seem to be clear instances of endorsement. Nonetheless, in *Wallace*, O'Connor suggested that these proclamations are permissible, observing that unlike school prayers, such proclamations "are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination." *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring). O'Connor's observation seems both accurate and wholly beside the point — at least if *endorsement* is the constitutional evil to be avoided. Her argument suggests that it is really *coercion* or *unwilling indoctrination*, not simple *endorsement*, that should be the touchstone of constitutionality.

148. See Loewy, *supra* note 45, at 1070 ("[T]he best way for the Court to keep the peace is to refuse to tolerate endorsement or disapproval of religion.").

149. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (declaring that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect"), with *Lynch*, 465 U.S. at 684 (denying that "political divisiveness alone can serve to invalidate otherwise permissible conduct"). See also Gibney, *supra* note 146, at 147 ("Political divisiveness is not a meaningful judicial standard"); McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 413 ("Religious differences in this country have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery."); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 710-11 (1968) (criticizing divisiveness argument).

150. See Paulsen, *supra* note 10, at 347 ("The invalidation of a 'divisive' policy because of its supposed 'divisiveness' can be the most 'divisive' action of all.").

151. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981).

152. See Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 94-98 (Supreme Court's establishment decisions have intensified rather than reduced religious conflict); cf. Baker, *The Religion Clauses Reconsidered: The Jaffree Case*, 15 CUMB. L. REV. 125, 139 (1984) ("The Supreme Court's school-prayer decisions have fanned, rather than doused, the flames of religious factionalism.").

division along religious lines.¹⁵³ In the aggregate, moreover, it seems likely that adoption of such a principle would create incentives that would intensify religious conflicts. If the principle calls for invalidation of laws that are *perceived* as endorsing or disapproving of religion, as in Justice O'Connor's formulation, then opponents of a particular measure have every incentive to wield the equivalent of a "heckler's veto" by manifesting their disapproving reaction in demonstrative ways.¹⁵⁴ Moreover, the same incentive may operate on both sides of a controversy; proponents of a measure may seek to demonstrate that its rejection or elimination would be perceived by many people as expressing *disapproval* of a religious value or belief. A test creating such incentives to demonstrative opposition is difficult to defend as a method of reducing religious division.¹⁵⁵

C. *Endorsement and Political Standing*

Cognizant of these difficulties, Justice O'Connor eschews potential divisiveness as an element of establishment doctrine.¹⁵⁶ Similarly, she does not assume that the "no endorsement" principle is axiomatic or self-evident. Instead, she purports to derive the "no endorsement" test from a more fundamental theoretical argument. Her starting premise is that "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."¹⁵⁷ This premise may need clarification; but the premise is at least an appealing proposition,¹⁵⁸ and the following

153. Donald Beschle, although very much in favor of a "no endorsement" test, observes that faithful application of the test "is likely to outrage separationists" and will be "offensive to some accommodationists." Beschle, *supra* note 45, at 191.

154. Even if the dispositive perceptions are those of the "objective observer" rather than of actual citizens, opponents of a measure might reasonably suppose that the visible reactions of actual human beings will at least influence a judge's opinion about what an "objective observer" would perceive.

155. Cf. Johnson, *supra* note 112, at 831 ("[B]y encouraging persons who are easily offended by religious symbolism to believe that the courts stand open to remedy their complaints, the courts foster divisive conflicts over religion.").

156. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

157. 465 U.S. at 687; *see also* *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

158. In addition to its intrinsic appeal, Justice O'Connor's premise can claim historical plausibility. In late seventeenth-century England, religious dissenters were tolerated but denied political rights. *See* R. BARLOW, *CITIZENSHIP AND CONSCIENCE* 57-76 (1962). This situation persisted in the colonies; dissenters were often permitted to worship but were "excluded from universities and disqualified for office, whether civil, religious, or military." L. LEVY, *supra* note 5, at 4. The establishment clause may well have been meant to remedy this situation. Thus, Thomas Jefferson's original religious freedom bill for Virginia had decreed that "our *civil rights* have no dependance on our religious opinions." Jefferson, *A Bill for Establishing Religious Freedom* (1779), in 5 *THE FOUNDERS' CONSTITUTION* 77 (P. Kurland & R. Lerner eds. 1987) (emphasis added). And Madison's first proposed version of what became the establishment clause provided that "[t]he *civil rights* of none shall be abridged on account of religious belief or wor-

analysis will assume that it is, in some sense, correct. O'Connor then asserts that governmental endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community."¹⁵⁹ Although this proposition may be debatable,¹⁶⁰ the present discussion will accept the proposition as provisionally true.

Even if both propositions are accepted, however, O'Connor's argument nonetheless fails because she provides no plausible link between them. Her attempt to tie endorsement of religion to the political standing of citizens is unpersuasive. To be sure, a law diminishing or elevating the political standing of citizens on religious grounds *might* also endorse or disapprove of religion, and vice versa. But those consequences of such a law are practically and analytically distinct. Thus, a doctrine forbidding endorsement of religion would operate haphazardly at best in preventing diminution or elevation of citizens' political status on the basis of their religion.

At one time, for instance, many states had laws which excluded clergy from serving in the legislature; Tennessee's exclusionary provision survived until 1978, when it was struck down by the Supreme Court.¹⁶¹ These laws plainly affected some persons' political standing on the basis of religion; the exclusionary laws made those persons ineligible for legislative office simply because they had chosen a religious vocation. On the other hand, whether the laws communicated approval or disapproval of religion is debatable; and the question conceivably might be answered differently in different jurisdictions.¹⁶² Such a law *might* reflect disapproval of religion, implying that ministers are unfit for public office.¹⁶³ Conversely, the law might suggest *approval* of religion; it might evince a belief that ministers are too vir-

ship." T. CURRY, *supra* note 139, at 199 (emphasis added). Historian Sidney Mead thus concludes that disestablishment meant that "sectarian dogmas and beliefs were made irrelevant to one's being and status as a citizen of the Republic." S. MEAD, *supra* note 56, at 41.

159. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

160. Persons who are in the minority on *any* issue may feel disappointment when their values or objectives are not adopted by government, but they need not feel like "outsiders" or lesser members of the political community. Mark Tushnet suggests that religious issues are no different from other political issues in this respect: "[N]onadherents who believe that they are excluded from the political community are merely expressing the disappointment felt by everyone who has lost a fair fight in the arena of politics." Tushnet, *supra* note 12, at 712.

161. *McDaniel v. Paty*, 435 U.S. 618 (1978). Professor Loewy cites *McDaniel* as a prime example of the potential explanatory value of a "no endorsement" test. Loewy, *supra* note 45, at 1052.

162. Such exclusionary laws were carried over from England, where "the practice of excluding clergy from the House of Commons was justified on a variety of grounds." *McDaniel*, 435 U.S. at 622 (plurality opinion).

163. See Gallant, *Disestablished Religion in Pennsylvania and Kentucky: A Study in Constitutional Interpretation*, 8 J. LEGIS. HIST. (forthcoming) (asserting that Kentucky's exclusionary provision was inspired by anticlericalism).

tuous, or are engaged in too important a calling, to be sullied and distracted by mundane political pursuits.¹⁶⁴ Or the law might reflect neither approval nor disapproval of religion, but merely a belief that both religion and politics are better off when kept apart. Whether a given exclusionary law endorses or disapproves of religion thus remains an open question that cannot be answered without further factual investigation. By contrast, no similar factual investigation is needed in order to decide that the law affects political standing on religious grounds; it plainly does. The critical point is that a law barring clergy from the legislature affects political status on the basis of religion *whether or not* the law also endorses or disapproves of religion.¹⁶⁵

If laws can alter political status without endorsing or disapproving religion, the reverse is also true; a law or governmental practice can endorse religion without altering political standing. Ceremonial uses of prayer, such as the invocation given before a legislative session, or public religious allusions such as the motto on coins confessing "In God We Trust," may communicate support or approval for religious beliefs.¹⁶⁶ But such endorsements do not appear to alter anyone's actual political standing in any realistic sense; no one loses the right to vote, the freedom to speak, or any other state or federal right if he or she does not happen to share the religious ideas that such practices appear to approve.

Of course, a message suggesting that minorities are not regarded and treated as full members of the political community might be *true*; minorities might actually be discriminated against in their political and civil rights. That possibility, however, hardly lends support to a

164. The Tennessee constitutional provision, for instance, was explicitly based upon the premise that "Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions." *McDaniel*, 435 U.S. at 621 n.1 (quoting TENN. CONST. art. VIII, § 1 (1796)).

165. Loewy cites the invalidation of religious oath requirements, *see* *Torcaso v. Watkins*, 367 U.S. 488 (1961), as another major instance of the explanatory value of a "no endorsement" test. Loewy, *supra* note 45, at 1052. But once again the effect of an oath requirement on political standing is analytically independent of whether it endorses religion. Imagine, for instance, that some creative historian demonstrates to everyone's satisfaction that a particular religious oath requirement originated with a governor who was indifferent to religion and whose purpose in imposing the requirement was to exclude from office a political rival who happened to be an atheist. Or the historical evidence might show that the oath requirement was originally imposed by a madman whose only intent was to be arbitrary or bizarre. Such evidence might convince everyone that the law had not actually been intended to indicate approval of religion; the law might thereby lose its "endorsement" effect. Nonetheless, the law's "status alteration" effect would remain unimpaired; atheists would still be excluded from office. Thus, "endorsement" and "status alteration" represent distinct, and severable, consequences of the law.

166. *Cf.* Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 947 (1986) ("The placement of 'In God We Trust' on coins and currency . . . seems to have no real purpose other than a religious one.").

test which specifies *endorsement* as the constitutional evil. Let us suppose that endorsements send messages telling minorities that they are not full members of the political community, and that they will be discriminated against in their political and civil rights. Such messages are either false or true. If the messages are false, and no discrimination is in fact occurring, then government is not in fact violating Justice O'Connor's basic premise that political standing should be independent of religion. If the messages are true, then government *is* violating that premise; but it is violating the premise by making religion relevant to political standing, *not* by sending messages which accurately acknowledge that fact. In this context, a doctrinal test or principle which focuses upon the *message*, rather than upon the underlying evil reflected in that message, seems positively perverse.

Thus, Justice O'Connor's premise divorcing religion from political standing does not logically lead to a "no endorsement" principle. Indeed, if taken literally, the proposition that religion should be irrelevant to political standing might even preclude such a principle. Eligibility to receive public benefits is arguably an important component of one's standing in the political community. By invalidating measures that are intended or perceived as endorsements of religion, however, O'Connor's test impedes government from subsidizing or assisting religious interests to the same extent and with the same freedom that it subsidizes or assists other kinds of interests. In a real sense, therefore, persons or institutions for whom such interests are central are less eligible for public benefits than are citizens or institutions for whom religious interests are *not* central.¹⁶⁷ Government can pay the salaries of school teachers — *unless*, that is, they choose to teach in religious schools.¹⁶⁸ Congress can directly subsidize farmers if it believes the public interest would be served (or even if farmers simply have a strong enough lobby to exact a subsidy). But Congress cannot on those grounds, or on any other grounds, directly subsidize clergy or Christian missionary societies; such a subsidy would surely be perceived as endorsing religion. Thus, taken at face value, O'Connor's premise that religion should not be "relevant in any way" to political standing not only fails to support a "no endorsement"

167. Cf. Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207, 214 (1978) (for religious persons, establishment decisions have resulted in "denial of full participation in the redistributive efforts of the welfare state").

168. See *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); cf. P. KAUPER, RELIGION AND THE CONSTITUTION 37 (1964) ("[I]f public funds are made available for all educational institutions whether public or private except those that are under the control of a religious body, it is indeed hard to avoid the conclusion that the religious factor is being used as a ground for disqualification from public benefits.").

principle, but indeed contradicts it.¹⁶⁹

If the goal of the establishment clause is to make political standing independent of religion, therefore, the proper doctrinal direction seems almost embarrassingly plain: The Supreme Court should develop doctrine which invalidates laws or practices that affect political or civil rights on religious grounds. There is no apparent reason for the Court instead to adopt a doctrinal test focusing upon an altogether different factor which is at best a less than faithful proxy for the goal the Court seeks to achieve.

D. *Alienation and Messages of Exclusion*

Even if Justice O'Connor has failed to link messages of endorsement to a diminution of actual political standing, one might still agree with her contention that such messages are undesirable. It seems both humane and politically expedient, after all, that government should refrain from acting in ways that alienate some of its constituents by making them feel like "outsiders," even if the political and civil rights of such persons are not thereby diminished. Thus, a more sympathetic response to Justice O'Connor's argument might suggest that the "no endorsement" principle can be justified on the basis of a "nonalienation" policy, quite apart from any dubious linkage to "political standing."

In evaluating this suggestion, a broader reference to more general constitutional protections for belief and expression is helpful. The Supreme Court has ruled that the freedom of belief is absolute,¹⁷⁰ and the freedom of speech, though not absolute, has received rigorous doctrinal protection.¹⁷¹ At the same time, the Constitution does not prevent government from adopting views and expressing judgments on a vast range of subjects.¹⁷² In making and expressing such judgments,

169. The foregoing analysis assumes that "standing in the political community" means something like enjoyment of the full rights and privileges of citizenship, including equal treatment under state and federal law, and perhaps equal eligibility for public benefits. This conception seems consistent with historical evidence suggesting that disestablishment made religion irrelevant to "civil rights." See note 158 *supra*. Justice O'Connor may have a different conception of "political standing"; but if so, she has not articulated, nor is it easy to infer, just what that conception is.

170. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

171. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of material allegedly affecting national security even though some Justices voting in majority conceded that immediate and irreparable injury to the nation would follow); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (expanding protection for speech advocating violence).

172. Thomas Emerson observes that "the first amendment . . . has served to prevent the government from prohibiting, harassing, or interfering with speech . . . [It] has not been viewed as a significant factor . . . to impose limits on governmental participation in the system [of expression]." Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 795 (1981). Although Emerson and others have sought to articulate limits on governmental speech, see also

government inevitably endorses some beliefs, disapproves others, and acts in ways that may cause some adherents of disfavored beliefs to feel like "outsiders"; but that consequence hardly precludes government from making judgments.¹⁷³ Indeed, because governmental disapproval of the beliefs of particular citizens does not prevent such citizens from voting, running for office, advocating their own positions, serving on juries, or claiming the full panoply of rights extended by state and federal law, those citizens are considered to be fully protected in their freedoms of belief and expression.

Of course, some people may feel inhibited in matters of belief and expression by the knowledge that particular positions have been endorsed or rejected by government; and someone conceivably might propose that this inhibition be eliminated, and that the freedoms of belief and expression be given even greater protection, through the adoption of a prohibition forbidding governmental messages which disapprove of the beliefs of some citizens and cause them to feel like "outsiders." But such a proposal would be ill-conceived. Government cannot act without making judgments; and such judgments will inevitably conflict with, and thereby imply disapproval of, the beliefs of some citizens. Unless we are attracted to governmental paralysis, therefore, we must reject any generalized nonalienation requirement.

Justice O'Connor's argument for forbidding messages that make some people feel like "outsiders" on religious grounds, though directed at a narrower category of messages, is vulnerable to a similar objection. Religious diversity in this country is rich enough to ensure that *any* governmental policy in an area that potentially concerns religion will probably alienate some people. If public institutions employ religious symbols, persons who do not adhere to the predominant religion may feel like "outsiders." But if religious symbols are banned

M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979), such limits at present exist only in the realm of academic theory. Cf. *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (Congress can subsidize lobbying activities of some organizations while denying subsidies to other such organizations); *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (rejecting argument that speech clause limits government's ability to fund political campaigns). Moreover, even if limits were actually adopted, they clearly could not amount to a general prohibition on the formation and expression of judgments by government, since the formation and expression of judgments is an inherent part of the process of governing.

173. For instance, communists may regularly be made to feel like "outsiders" by government pronouncements and actions condemning communism. In some states, and during some periods, Democrats — or Republicans, or members of any other political party or persuasion — may be made to feel like "outsiders" by government pronouncements disapproving their respective beliefs. The first amendment protects the right of all such persons and groups to hold and advocate their beliefs; it does not impose any prohibition precluding government from acting in ways that will disapprove their views and make them feel like "outsiders."

from such contexts, some religious people will feel that their most central values and concerns — and thus, in an important sense, they themselves — have been excluded from a public culture devoted purely to secular concerns. Once again, *Lynch* is illustrative: Whether the crèche was included in or removed from the Christmas display, the sincere religious sensibilities of some citizens would be offended.¹⁷⁴ Cogent or not, the polemics of what may be called the "religious right" provide powerful evidence of the alienation and frustration generated by Supreme Court decisions that have excluded religious practices from some areas of public life, such as the schools,¹⁷⁵ and that have established, in the view of some believers, an antireligious "secular humanism."¹⁷⁶

Indeed, alienation produced by Supreme Court decisions may be even more severe than alienation provoked by actions of legislatures or lower government officials. Legislative or municipal action, after all, represents temporary and possibly correctable policy — often of only a particular state or municipality. Offensive constitutional decisions, on the other hand, send a message telling the disfavored that their central beliefs and values are incompatible with the fundamental and enduring principles upon which the Republic rests.

Nearly everyone, of course, will feel greater sympathy for some groups that have been alienated by government policies than for other

174. The plaintiffs in the case viewed the crèche as an endorsement of Christianity. See note 132 *supra*. On the other hand, the attempt to remove the crèche provoked an outpouring of opposition, including a number of letters that were introduced at trial. The district court stated that these letters "evidence a deep concern about and resentment for what most of the correspondents regarded as an attack on a cherished religious symbol. . . . Overall the tenor of the correspondence is that the lawsuit represents an attack on the presence of religion as part of the community's life" *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981), *affd.*, 691 F.2d 1029 (1st Cir. 1982), *revd.*, 465 U.S. 668 (1984).

Another current issue illustrating the difficulty is the question of whether student religious groups should be permitted to meet in public schools on essentially the same terms as other student groups. Compare Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in Public Schools*, 81 NW. U. L. REV. 174 (1986) (arguing that permitting religious groups to meet communicates governmental support for religion), with Esbeck, *Religion and a Neutral State: Imperative or Impossibility*, 15 CUMB. L. REV. 67, 71 (1984) (condemning exclusion of religious student groups as "shamefully discriminatory").

175. Michael McConnell notes that the "'religious right' argues that an entirely secular public school will be perceived by students as hostile toward religion." McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 164 (1986). See also Schwarz, *The Nonestablishment Principle: A Reply to Professor Giannella*, 81 HARV. L. REV. 1465, 1477 (1968) (noting "the anti-religionism of the public schools").

176. The charge that the Supreme Court's religion clause decisions have established "secular humanism" is not confined to fundamentalist preachers and right wing politicians, but has found expression in the academic literature as well. See, e.g., Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3, 9-19 (Spring 1981); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177; Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1978).

such groups. Nor are such sympathies necessarily illegitimate; it may be that adequate reasons can be given for concluding that the alienation felt by Jews, Moslems, agnostics, or other religious minorities is constitutionally cognizable, whereas the alienation felt by Fundamentalist Christians should not influence constitutional policy (or vice versa). Suppose, for instance, that a historian or constitutional theorist were to advance a compelling exposition and argument in favor of, let us say, a theory of "strict separation." The exposition is so lucid and the argument so compelling, we may suppose, that the "strict separation" construction gains general acceptance by virtually all judges and scholars, and quickly becomes the law of the land. Nonetheless, some groups would inevitably object to the content or consequences of such a construction, perhaps because they believe that government *should* support religion and that separation amounts to "political atheism."¹⁷⁷ We might conclude, however, that any alienation felt by such groups, although perfectly sincere, should be disregarded because their dissatisfaction actually results not from particular governmental actions but rather from the very meaning of the establishment clause. We could, in other words, properly distinguish between groups who are alienated by *violations* of the establishment clause and groups who are offended by *the establishment clause itself*.

This possibility assumes, however, that a correct exposition of the establishment clause would specify something other than prevention of alienation as the clause's controlling purpose. Conversely, if the central purpose of the establishment clause is simply to prevent alienation (and the messages which cause it), then the distinction between justified and unjustified alienation disappears. What is justified must be determined, after all, by reference to the establishment clause. If the purpose of the clause is simply to prevent alienation, then if government produces alienation, that fact alone demonstrates that the establishment clause has been violated.

Thus, an approach which emphasizes the prevention of alienation as the purpose of the establishment clause is perhaps the only approach which, instead of grounding distinctions between justified and unjustified complaints by alienated groups, in fact legitimates all such complaints. And if virtually every governmental action or measure, including a "no endorsement" test,¹⁷⁸ will alienate some persons on religious grounds, then the nonalienation approach to the establishment clause is simply unworkable.

177. See J. MURRAY, *THE PROBLEM OF GOD* 99-100 (1964) (describing modern notions of church-state separation as "political atheism").

178. See note 153 *supra*.

In sum, the fact that citizens may sometimes feel like "outsiders," however unfortunate, does not provide a secure doctrinal foundation for the protection either of belief and expression generally or of religious belief in particular. Ultimately, a degree of alienation must be acknowledged as an inevitable cost of maintaining government in a pluralistic culture. In such a culture, some beliefs must, but not all beliefs can, achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like "outsiders." Because the phenomenon is inherent in a pluralistic culture, the aspiration to abolish that phenomenon, or to develop a conception of "political standing" that includes a right not to feel like an "outsider," constitutes a utopian vision rather than a realistic basis for formulating constitutional doctrine.

IV. THE ALLURE OF NEUTRALITY

The foregoing analysis suggests that several possible justifications for the "no endorsement" test, including the one suggested by Justice O'Connor, are seriously flawed. But this conclusion produces a puzzle: If O'Connor's test is deficient as doctrine, and if the theoretical justifications offered for the test are unpersuasive, then why has the "no endorsement" proposal generated such widespread support? The solution to this puzzle appears only when the test is viewed against the backdrop of the long-standing quest to define a position of governmental neutrality towards religion.

A. *The Quest for Neutrality*

It is hardly surprising that the idea of "neutrality" has exerted a magnetic attraction in establishment analysis. History amply demonstrates that controversies over religious issues can be onerous on a number of levels — theological, psychological, political — and it is enticing to think that government might somehow remain aloof from such controversies. The idea of neutrality appears to offer this possibility; it evokes the image of a government which can stand dispassionately above the fray, shunning involvement in religious disputes while maintaining a fair and impartial stance that offends none of the parties to such disputes.

Hence, in its first modern establishment case, the Supreme Court committed itself to the ideal of neutrality.¹⁷⁹ Later cases fastened even

179. *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (declaring that the establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers").

more firmly onto neutrality as the guiding principle for regulating church-state relations;¹⁸⁰ and the emphasis upon neutrality was preserved through the adoption of the *Lemon* test.¹⁸¹ In its most recent term, the Court reaffirmed its commitment to neutrality as an establishment ideal.¹⁸² Like the Court itself, countless commentators have advocated neutrality as the fundamental tenet of the establishment clause.¹⁸³

This pervasive commitment to neutrality has not yet generated any clear and convincing account of what neutrality actually entails. It has become increasingly clear, rather, that neutrality is a "coat of many colors."¹⁸⁴ Thus far, the concept's protean character has not noticeably undermined its appeal, and may even have enhanced it; virtually anyone can find a nostrum to his liking in the cabinet of neutrality. However, the slipperiness of the concept has impeded the development of coherent and predictable doctrine. *Everson v. Board of Education*¹⁸⁵ foreshadowed the confusion. The question in the case was whether a state could pay for the cost of busing students to and from parochial schools. All of the Justices wanted to find an answer compatible with the idea of neutrality. However, some Justices thought that since the state already transported public school students, neutrality required that parochial school students receive simi-

180. *E.g.*, *Walz v. Tax Commn.*, 397 U.S. 664, 668-69 (1970); *Abington School Dist. v. Schempp*, 374 U.S. 203, 214-26 (1963).

181. *See Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971). The Court derived the "secular purpose and effect" prongs of the *Lemon* test from the *Schempp* decision and the "entanglement" prong from the *Walz* decision. Both of these decisions had emphasized the centrality of neutrality in establishment jurisprudence.

182. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2867 (1987); *Hobbie v. Unemployment Appeals Commn.*, 107 S. Ct. 1046, 1051 (1987).

183. *E.g.*, Laycock, *supra* note 5, at 409; Braveman, *supra* note 16, at 353; Esbeck, *supra* note 174, at 68, 86; Beschle, *supra* note 45, at 174; Paulsen, *supra* note 10, at 325-26; Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127, 127-29, 166-67 (1985); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1475 (1981) [hereinafter Columbia Note]; Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POLY. 125, 138 (1979); Wheeler, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 HASTINGS CONST. L.Q. 901, 911-14 (1977); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 513-14 (1968); W. KATZ, *supra* note 14, at 13; P. KURLAND, *RELIGION AND THE LAW* 112 (1962); *see also* Johnson, *supra* note 112, at 818 ("That in some sense the federal government and the states ought to be 'neutral' in religious matters is undisputed . . .").

184. *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring). For discussions distinguishing or categorizing different versions of neutrality, *see* Note, *Government Noninvolvement with Religious Institutions*, 59 TEXAS L. REV. 921, 931-33 (1981); Wheeler, *supra* note 183, at 911-15; M. HOWE, *THE GARDEN AND THE WILDERNESS* 152-54 (1965); P. KAUPER, *supra* note 168, at 70-76.

185. 330 U.S. 1 (1947).

lar treatment, while other Justices believed the demands of neutrality were fully satisfied by allowing all students to attend public school if they chose.¹⁸⁶

The frequently noted inconsistency of results under the *Lemon* test indicates that the essential indeterminacy remains as vigorous as ever. Nor is the malady likely to be cured. If the problem were simply that government lacks the will to adhere to a clear principle, as commentators occasionally suggest,¹⁸⁷ the case would be more hopeful. Steeling itself to resist religious pressure and to disregard entrenched religious traditions, the Supreme Court could simply force government to be neutral. Indeed, even if the tension between the neutrality thought to be required by the establishment clause and the accommodation demanded by the free exercise clause is taken into account, there might still be room for hope; the Court just might hit upon a construction of the free exercise clause that would reduce the tension.¹⁸⁸

Unfortunately, the root of the difficulty runs deeper still. Scholars are coming to recognize that the very concept of neutrality is inherently indeterminate.¹⁸⁹ Professor John Valauri has recently argued that establishment neutrality has been and must be understood to contain two components: noninvolvement and impartiality. In many contexts, however, these components push in opposite directions. Thus, "[t]he concept of neutrality is indeterminate because it is irresolvably and multiply ambiguous."¹⁹⁰

Another sign of the conceptual breakdown is the disagreement about the relationship between neutrality and other establishment values such as separation and voluntarism. The *Everson* Court supposed, as have many commentators, that these values are harmonious and

186. Compare *Everson*, 330 U.S. at 18 (majority opinion), with 330 U.S. at 58-60 (Rutledge, J., dissenting). For a more extensive discussion of the confusion evident in *Everson* with regard to neutrality, see Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 94-104 (1986).

187. E.g., Columbia Note, *supra* note 183, at 1466-77.

188. For instance, Justice Stevens has suggested that there should be "virtually no room" for constitutionally required exemptions from laws that are neutral towards religion in their general application. *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring). Whatever its other merits or drawbacks, Stevens' position would at least reduce the need to qualify establishment neutrality in order to satisfy free exercise requirements, since the free exercise clause would no longer impose any significant requirements beyond "neutrality."

189. Doubts about the coherence of neutrality as a value are not limited to the role of that value in church-state jurisprudence. See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 40-47 (1984); Frug, *Why Neutrality?*, 92 YALE L.J. 1591 (1983); Hyde, *Is Liberalism Possible?* (Book Review), 57 N.Y.U. L. REV. 1031, 1036-41 (1982).

190. Valauri, *supra* note 186, at 93. See generally *id.* at 84-128. See also McConnell, *supra* note 175, at 161-64 (arguing that where government has a pervasive presence, neutrality is impossible because even "a government practice of 'strict neutrality' . . . is not truly neutral").

mutually supporting,¹⁹¹ but critics argue that such values are in fact often incompatible.¹⁹² In a similar vein, neutrality is said by some to require "accommodation" of religion, and by others to forbid it.¹⁹³

The quest for neutrality has thus created a conundrum. We require government to be neutral. But our attempts to say what neutrality means turn out to be indeterminate and deeply ambiguous.

B. *The Jurisprudence of Symbolism*

At this point, the neutrality enterprise may enlist in its aid a proposal that can be described as the "jurisprudence of symbolism." This proposal urges that in applying the establishment clause, the judiciary should be less concerned about whether a law actually benefits religion, but should invalidate measures that *appear* to favor religion. Professor William Marshall, who has advanced the most thoughtful and systematic version of this position, explains that "a jurisprudence that is primarily 'symbolic' and not 'substantive' [is] . . . concerned less with the substantive goal of limiting certain types of government involvements and supports of religion than with eliminating the *perception* of improper government action."¹⁹⁴

191. *Everson* emphatically favored all of these values, seemingly regarding them not only as consistent but as almost interchangeable. See *Everson*, 330 U.S. at 11 ("individual religious liberty"); 330 U.S. at 13 ("religious liberty"); 330 U.S. at 16 ("wall of separation"); 330 U.S. at 18 (neutrality, separation). See also Laycock, *supra* note 18, at 7 (separationists agree that government should be neutral); Columbia Note, *supra* note 183, at 1463 (equating strict separation with strict neutrality).

192. See, e.g., McConnell, *supra* note 175, at 147 (separation value not neutral); *id.* at 151 (religious liberty requires departures from neutrality); Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677, 686-87 (showing tension between values of separation, voluntarism, and neutrality).

193. Compare *Cornelius*, *supra* note 10, at 36 (neutrality requires accommodation), and J. WHITEHEAD, *THE FREEDOM OF RELIGIOUS EXPRESSION IN THE PUBLIC HIGH SCHOOLS* 10-17 (1983) (same), with Columbia Note, *supra* note 183, at 1474-75 ("strict neutrality" precludes aid to religion). See also P. KAUPER, *supra* note 168, at 70-75 (arguing that accommodation modifies neutrality).

194. Marshall, *supra* note 45, at 498 (emphasis added). Marshall illustrates the distinction as follows: "[A]ssume a state provides direct financial payment to a minister. The establishment harm is not in the payment. It is in what the payment symbolizes." *Id.* at 513. Under this approach, "programs with only minimally favorable religious effects may create establishment problems, while programs with highly substantial effects may not." *Id.* at 531-32.

Although Marshall has provided the most developed exposition of the jurisprudence of symbolism, he is certainly not its only advocate. The Supreme Court has exhibited an increasing concern with the symbolic consequences of establishment doctrine and decisions. See text at notes 201-06 *infra*. So have other academic commentators. See, e.g., Kurland, *supra* note 11, at 6 (arguing that church-state issues "may be more important as symbols than for pragmatic reasons"); Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 B.Y.U. L. REV. 509 (adopting symbolic approach, but arguing that some use of religious symbols should be permitted); L. TRIBE, *supra* note 115, at 843-44 (emphasizing importance of "symbolic impact" in assessing aid to religious schools); Harvard Note, *supra* note 45, at 1689-93 (emphasizing importance of "symbolic linkage" in establishment decisions).

Likewise, although wary of giving constitutional protection to symbols, see Johnson, *supra*

The jurisprudence of symbolism seeks to solve the problem of defining actual neutrality by skirting it: Since experience shows that we cannot agree upon what neutrality actually *is*, perhaps we should table the matter, and instead concern ourselves with whether governmental action *appears to be*, or not to be, neutral.¹⁹⁵ Thus, the argument for a symbolic jurisprudence begins by showing the impossibility of resolving establishment problems on the basis of "substantive" principles.¹⁹⁶ The argument then holds out the jurisprudence of symbolism as the avenue of escape from these analytical difficulties.¹⁹⁷ Although advocates of this approach have not spelled out as clearly as one might wish just how the jurisprudence of symbolism escapes conceptual difficulties, the underlying logic of their position can be extrapolated. The invitation to adopt the *appearance* of neutrality as the dispositive criterion is seductive because it seemingly requires us only to know our own minds and perceptions. Perhaps we cannot define just what it would mean for government to *be* neutral; but surely we can at least say when an action *appears to be* neutral.

In this respect, the jurisprudence of symbolism is reminiscent of broader philosophical attempts to overcome difficulties in achieving knowledge of the external world by turning inward and adopting our own perceptions as the proper objects of immediate knowledge. The "sense datum" approach to knowledge advocated by phenomenalist philosophers in the first half of this century illustrates the strategy.¹⁹⁸

note 112, at 831, Phillip Johnson stresses the importance of appearances; he argues that "[g]overnment must *seem* to be evenhanded about religious disputes. What it does may coincide with the wishes of some groups and thwart the plans of others, but this coincidence must *seem* to be the outcome of neutral principles or fair-minded interest balancing, rather than conscious partisanship" *Id.* at 845 (emphasis added). Perhaps remembering that he has elsewhere criticized "sham neutrality" by the courts, Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 266-80 (1984), Johnson hastens to add that "[t]he emphasis upon neutrality is not necessarily deceptive." Johnson, *supra* note 112, at 845. In view of Johnson's bleak depiction of the possibility of articulating neutral principles in this area, *id.* at 820-39, however, it is hard to see how a decision that would "seem to be the outcome of neutral principles" could be anything but deceptive.

195. Like Justice O'Connor, Marshall explicitly refers to "endorsement," not "neutrality," as his central concern. Marshall, *supra* note 45, at 513. A concern about preventing "endorsement" of religion, however, can best be understood as an expression of the goal of maintaining symbolic neutrality toward religion. See note 210 *infra* and accompanying text.

196. See Marshall, *supra* note 45, at 500-03. Marshall concludes that "[e]stablishment principles are simply not susceptible to consistent implementation." *Id.* at 513. Johnson similarly observes that establishment doctrine is "radically indeterminate" and that "the doctrinal objectives are inherently contradictory." Johnson, *supra* note 112, at 820, 839.

197. Marshall asserts that "a symbolic approach absorbs the tensions within establishment" and suggests that Justice O'Connor's *Lynch* opinion demonstrates how this reconciliation occurs. Marshall, *supra* note 45, at 532. In light of the outrage generated by *Lynch*, and the insistence by many critics that the crèche was clearly an endorsement of Christianity, see notes 15-19 & 132 *supra* and accompanying text, this claim is at least a courageous one.

198. See, e.g., A.J. AYER, THE FOUNDATIONS OF EMPIRICAL KNOWLEDGE (1940); B. RUSSELL, OUR KNOWLEDGE OF THE EXTERNAL WORLD 75-134 (2d ed. 1929).

Such philosophers argued that by focusing on perceptual phenomena we can achieve certainty, at least in some matters.¹⁹⁹ If I say, "A cow is standing by the barn," my assertion may be wrong. The animal standing by the barn may be a horse. Or there may be nothing "out there" at all; I may be hallucinating. But if I say, "I see a brown patch," I cannot be wrong, since I am only making an assertion regarding my own sense perceptions, about which I can hardly be mistaken.²⁰⁰ At least, so the argument runs.

Arguments for an establishment doctrine that focuses on appearances or perceptions evince a similar logic. If I say that government *is*, or is *not*, acting neutrally, someone may — and usually will — disagree. But if I merely say that government *appears* (to me) to be acting neutrally, how can anyone contradict me? Of course, as soon as I make the broader assertion that a law appears neutral not only to me but to people generally, or to a "reasonable" or "objective" observer, the possibility of disagreement is revived. Still, no one can plausibly dispute (can anyone?) that I have at least described how the law appears *to me*; and the very fact that the law appears neutral *to me* should at least count as evidence for the more unqualified assertion about how the law "appears." Most importantly, my assertion that a law "appears" neutral cannot be refuted by arguments showing that in some sense the law is not *actually* neutral, since my assertion does not purport to say anything about the law's actual neutrality. Thus, the shift to a phenomenalist doctrine which focuses upon the symbolic aspects of governmental action seems to offer a less vulnerable foundation for making assertions and drawing conclusions, while eliminating the necessity of defining what neutrality actually is.

199. A.J. Ayer contended that a sense-datum proposition is "incorrigible," or incapable of being falsified, because "it is completely verified by the existence of the sense-datum which it describes; and so it is inferred that to doubt the truth of such a proposition is not merely irrational but meaningless." A.J. AYER, *supra* note 198, at 83. Bertrand Russell argued that the "hardest of hard data" consist of sense data and logical truths, and that to doubt such data would be "pathological." B. RUSSELL, *supra* note 198, at 75.

200. H.H. Price expressed the argument illustratively:

When I see a tomato there is much that I can doubt. I can doubt whether it is a tomato that I am seeing, and not a cleverly painted piece of wax. I can doubt whether there is any material thing there at all. Perhaps what I took for a tomato was really a reflection; perhaps I am even the victim of some hallucination. One thing however I cannot doubt: that there exists a red patch of a round and somewhat bulgy shape, standing out from a background of other colour-patches, and having a certain visual depth, and that this whole field of colour is directly present to my consciousness. What the red patch is, whether a substance, or a state of a substance, or an event, whether it is physical or psychical or neither, are questions that we may doubt about. But that something is red and round then and there I cannot doubt. Whether the something persists even for a moment before and after it is present to my consciousness, whether other minds can be conscious of it as well as I, may be doubted. But that it now *exists*, and that *I* am conscious of it — by me at least who am conscious of it this cannot possibly be doubted.

H. PRICE, *PERCEPTION* 3 (rev. 2d ed. 1950) (emphasis in original) (footnote omitted).

C. *The "No Endorsement" Test as an Expression of Symbolic Neutrality*

Justice O'Connor is not the first jurist to be drawn to the jurisprudence of symbolism. Professor Marshall argues that a large number of seemingly inconsistent establishment decisions can be reconciled on symbolic grounds.²⁰¹ Whether Marshall's proffered reconciliations are persuasive is perhaps debatable; a severe reader might instead view Marshall's analysis as powerful evidence for his later observation that "a symbolic theory is . . . subject to extraordinary manipulation."²⁰² Recently, however, the Supreme Court's occasional concern for symbolism has become explicit. Thus, although programs subsidizing religious schools may be unconstitutional,²⁰³ functionally similar programs have been upheld when monetary aid is given directly to the students, or to their parents, rather than to the school itself.²⁰⁴ By eliminating the religious institution as the direct recipient of state funds, the Court has said, such programs avoid communicating an "imprimatur of State approval" for the institution.²⁰⁵ And the Court has emphasized the importance in evaluating school aid programs of "symbolic impact" and of a possible "symbolic union of government and religion."²⁰⁶

Although the current *Lemon* test may be loose enough to permit consideration of symbolic factors, however, the test's emphasis upon the "principal or primary effect" of a law more naturally encompasses the law's substantive consequences, not merely the appearances it creates. The test as verbalized retains a commitment to *actual* neutrality, not merely to *symbolic* neutrality. Consequently, an opinion explaining why a law is neutral in appearance can still be embarrassed by the objection that the law in fact confers sizable material benefits on religion, and thereby deviates from *actual* neutrality.²⁰⁷

Justice O'Connor's "no endorsement" test removes this embarrass-

201. Marshall, *supra* note 45, at 514-31.

202. *Id.* at 533.

203. *E.g.*, *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

204. *Mueller v. Allen*, 463 U.S. 388 (1983); *see also* *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (reversing Washington decision which invalidated grant of vocational aid to blind student studying for the ministry).

205. *Mueller*, 463 U.S. at 399.

206. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390-92 (1985).

207. *See Mueller*, 463 U.S. at 409 (Marshall, J., dissenting) (pointing out that although school aid program was facially neutral, about 96% of parents eligible for tuition deduction sent their children to religious schools).

ment by carefully embracing the jurisprudence of symbolism.²⁰⁸ The shift is most conspicuous in the test's second prong, which inquires into the perceptions or appearances that a law creates while conceding the possible constitutionality of a law that "in fact causes, even as a primary effect, advancement or inhibition of religion."²⁰⁹ More fundamentally, the concern for symbolism is inherent in the very notion of "endorsement," and in the pervasive concern about "messages" rather than material consequences. Thus, even under the test's first prong, the question is not whether government intends to *aid* religion. Discussing the permissibility of aid would inevitably involve courts in a debate about what neutrality *is*; and that is a debate which the "no endorsement" test studiously shuns. Instead, the first prong asks whether government has intended to *endorse* religion — which may naturally be understood as a way of asking whether government has attempted to depart from an attitude, or appearance, of neutrality.

In essence, Justice O'Connor's test imposes upon government the obligation to maintain an appearance of neutrality toward religion.²¹⁰ Government acts improperly both when it consciously seeks to violate that obligation and when, intentionally or not, it in fact acts in ways that do not seem neutral. Thus, maintaining the appearance of neutrality is the central concern in both the "intent" and "perception" prongs of O'Connor's test.

V. SYMBOL OR ILLUSION? THE EMPTINESS OF NEUTRALITY AS AN ESTABLISHMENT IDEAL

The "no endorsement" test brings to culmination two important themes in contemporary church-state analysis: the quest for neutrality, and the jurisprudence of symbolism which supplements that quest and seeks to rescue it from the conundrum caused by the inability to articulate what neutrality actually means. Those themes represent powerful currents in contemporary thinking about the establishment

208. "[T]he thrust of her analysis is the search for symbolic meaning." Marshall, *supra* note 45, at 517.

209. *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring).

210. As discussed above, the justification offered by Justice O'Connor for her proposal does not explicitly rest upon the ideal of neutrality; O'Connor has expressed reservations about whether the notion of neutrality can fully reconcile the perceived tensions between the establishment and free exercise clauses. *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985). However, commentators favorable to O'Connor's approach have recognized that the appeal of the test lies in its attempt to implement the ideal of neutrality. See Braveman, *supra* note 16, at 385 ("the endorsement test looks very similar to the neutrality principle"); Lacey, *supra* note 45, at 654 (linking proposed prohibition against "symbolic aid to religion" with assumption that "the Constitution requires neutrality towards religion"); Loewy, *supra* note 45, at 1049-51; Beschle, *supra* note 45, at 174-75; Strossen, *supra* note 45, at 373 n.218.

clause; and by situating itself squarely in the middle of those currents, the "no endorsement" test has been carried forward by the stream. Where those currents will ultimately lead, however, is a question that deserves further consideration.

A. *The Failure of the Phenomenalistic Strategy*

The foregoing analysis has suggested that the jurisprudence of symbolism seeks to avoid the failures of earlier efforts to define the concept of neutrality by dropping the attempt to describe what governmental neutrality toward religion *is*, and instead focusing upon whether government *appears* to be acting neutrally. This strategy parallels the sense-datum turn in theory of knowledge, which disowned the effort to obtain immediate knowledge of external objects as things in themselves, and instead adopted human perceptions, or sense data, as the proper objects of direct knowledge. However, the sense-datum theory has been powerfully criticized,²¹¹ and at least one of those criticisms applies forcefully to the "no endorsement" strategy.

Responding to the contention that sense-datum sentences such as "I see magenta now" are "incorrigible," or incapable of being falsified, the analytic philosopher J.L. Austin pointed out that such sentences may be false because the speaker may use words incorrectly. "I may say 'Magenta' wrongly," Austin observed, "either by a mere slip, having meant to say 'Vermillion'; or *because I don't know quite what 'magenta' means, what shade of colour is called magenta . . .*"²¹² With respect to sense-datum statements such as "I see magenta," the kind of error identified by Austin may seem to be technically possible but easily avoidable in practice; and Austin acknowledged as much. We can prevent such mistakes by being sure we know what "magenta" means before we use the word, and then by attending carefully to our perceptions.

However, the problem identified by Austin becomes much more persistent when we make assertions that government appears, or does not appear, to be acting neutrally with respect to religion. As Austin's argument makes clear, even statements about how things "appear" presuppose that we understand the meaning of the words we are using. At most, therefore, statements about appearances might permit us to avoid determining whether our perceptions correspond to some exter-

211. See generally W. SELLARS, *SCIENCE, PERCEPTION AND REALITY* 127-96 (1963); J.L. AUSTIN, *SENSE AND SENSIBILIA* (1962); G. RYLE, *THE CONCEPT OF MIND* 210-22 (1949).

212. J.L. AUSTIN, *supra* note 211, at 113 (emphasis added). Although he disagreed with Austin over the significance of such errors, Ayer conceded the possibility of "verbal errors" even in sense-datum statements. A.J. AYER, *supra* note 198, at 81-84.

nal reality; such statements do nothing to eliminate confusion that inheres in the words or concepts we use. As noted earlier, however, efforts to define what the concept of neutrality means in practice have been notoriously unsuccessful.²¹³ But if we are not sure what neutrality means, then we cannot confidently make statements about whether government appears to be acting neutrally. So long as we are not sure what a position of neutrality *is*, in other words, we cannot say whether government appears to be adhering to such a position. Indeed, so long as the concept of neutrality remains fuzzy and ambiguous, we cannot be sure when we use the word that we are really even communicating, or that we are talking coherently at all.

Consider once again the *Everson* problem: Does the state act neutrally when it pays to bus children to parochial school? Some of the Justices argued that the policy was not neutral because it involved government in religion, gave assistance to religion, and facilitated religious activities. Other Justices argued that the state's policy was neutral because it merely put religious school students on an equal footing with public school students, whose transportation costs were also paid by the state.²¹⁴ These positions obviously reflected differing conceptions of neutrality. The critical issue at this point is whether such disagreements might be reconciled, or at least avoided, by abandoning the question of whether the state's policy *is* neutral and instead asking whether the policy *appears* to be neutral. And the obvious answer is that amending the question to ask about appearances does not even touch the problem; the disagreement over what neutrality means remains as lively as ever. If neutrality means noninvolvement, or "no aid," then the state policy both *is* and *appears* to be a violation of neutrality. Conversely, if neutrality means giving religious school children the same assistance that public school children receive, then the policy *is* and *appears* to be neutral. The meaning of neutrality remains unclear; what *is* clear is that asking about symbolic rather than actual neutrality does not advance the discussion at all.²¹⁵

Professor Marshall acknowledges this difficulty, though in other terms, when he asserts that "in a pluralistic culture, there is often no shared consensus of symbolic meaning," and that "how endorsement is perceived depends largely upon one's initial outlook."²¹⁶ Nor does

213. See notes 184-93 *supra* and accompanying text.

214. See notes 185-86 *supra* and accompanying text.

215. Altering doctrine so as to emphasize perceptions or appearances might be helpful if people generally agreed about what the state may properly do but frequently disagreed about what the state is in fact doing. As *Everson* illustrates, however, that is not the nature of most establishment controversies.

216. Marshall, *supra* note 45, at 533-34.

he try to wish this problem away, as Justice O'Connor does, by hypothesizing an "objective observer" in whom divergent perspectives will inexplicably be reconciled or submerged. Indeed, he effectively criticizes the attempts of both Justice O'Connor and Justice Brennan to resolve the problem.²¹⁷

But Marshall offers no other persuasive solution to the problem of divergent perspectives. He suggests that "if the Court can agree upon the appropriate initial perspective to employ in establishment cases, the range of individualized interpretations will be profoundly limited."²¹⁸ But this suggestion is not helpful. *Of course* establishment problems would be less intractable if we could identify the appropriate initial perspective, or conception of neutrality, from which to approach those problems. But that is precisely the difficulty: Because perspectives are in fact incurably diverse, a policy against creating perceptions that government has endorsed or disapproved of religion can provide no grounds for identifying one perspective, or one conception of neutrality, as correct.

To be sure, the Court *could* prescribe an "ardent separationist" perspective with respect to public schools, an "accommodationist" perspective for reviewing governmental practices and regulations, and a perspective of "qualified neutrality" for considering aid to parochial education, as Marshall recommends.²¹⁹ But why *should* the Court embrace those perspectives? One answer might assert that the perspectives Marshall prescribes are appropriate because they are the perspectives that most people in fact assume in such contexts. But this is not Marshall's answer. He recognizes that the broad diversity of perspectives in a pluralistic culture makes consensus on appropriate perspectives unlikely,²²⁰ and that even if most people did agree upon particular perspectives, the majority view would not have any good claim to control.²²¹

Because Marshall cannot argue that his favored perspectives represent any *de facto* consensus, he is forced to contend that adopting such perspectives would lead to sound results as measured by criteria *other than* actual perceptions of endorsement. Thus, Marshall emphasizes that adoption of the prescribed perspectives would maintain continuity

217. *Id.* at 535-37.

218. *Id.* at 538.

219. *Id.* at 541, 545, 548. Of course, whether the conception of "qualified neutrality" is any more helpful than other conceptions of neutrality that the Court and commentators have advocated is questionable.

220. *Id.* at 533-34.

221. *Id.* at 535.

with past decisions.²²² He also refers to other policies, such as recognizing our cultural heritage, and avoiding church-state entanglement.²²³ Such policies are hardly new, of course, and they have not in the past led to coherent doctrine or consistent decisions. But the more important point is that these justifications for Marshall's prescribed perspectives have little to do with the supposed significance of perceptions, symbolism, and endorsement. Symbolism and perceptions, rather, turn out to be simply inconclusive, while other policies such as *stare decisis* in fact become dispositive.

Admittedly, Marshall attempts to link some of these independent policies back to a concern about actual endorsement; but the attempt is unpersuasive. He suggests, for instance, that government practices consistent with our "cultural heritage" should be permitted, and tries to square this conclusion with the proposed prohibition on endorsement by suggesting that, if a public practice is part of our cultural heritage, it will not be perceived as an improper endorsement of religion. Thus, "an adjustment for 'cultural heritage' " can be "built into the establishment equation [as] . . . a part of the relevant frame of reference from which endorsement or non-endorsement would be perceived."²²⁴ But if this argument is supposed to relate cultural heritage to actual perceptions of endorsement, then the argument rests upon a false dichotomy. There is no reason to suppose that a particular practice or message touching upon religion must *either* reflect our cultural heritage *or* endorse religion; it may do *both*.²²⁵ Indeed, since our cultural heritage surely includes religious traditions, including the tradition of governmental endorsement of religion,²²⁶ many practices undoubtedly *will* do both. Marshall's argument that actions consistent with cultural heritage will not be seen as endorsements leads to a paradoxical conclusion: In a strongly religious culture in which pervasive and overt governmental support for religion is taken for granted, government will *never* endorse religion. Conversely, the less religious government and culture become, the more likely it is that government will violate the establishment clause by endorsing religion.²²⁷

222. *Id.* at 539-41.

223. *Id.* at 542, 546.

224. *Id.* at 532.

225. Marshall here duplicates Justice O'Connor's error of treating "accommodation" and "endorsement" as creating a dichotomy, rather than as concepts that in practice will usually overlap. See notes 70-71 *supra* and accompanying text.

226. See notes 139-42 *supra* and accompanying text.

227. Nor can Marshall save the point by suggesting that actions consistent with our cultural heritage will be seen as endorsements but not as "improperly endorsing religion." Marshall, *supra* note 45, at 532 (emphasis added). In the first place, such actions *will* be seen by many as improper, as the reaction to *Lynch* demonstrates. Moreover, if the establishment clause does not

In sum, Marshall's argument begins by asserting that the Supreme Court should invalidate laws that create perceptions of endorsement. Marshall then concedes that perceptions of endorsement depend upon perspectives, which in a pluralistic culture may vary considerably from person to person. Thus, the criterion of perceptions, or symbolic impact, will rarely indicate whether a law or practice is constitutional; instead, that criterion will point both ways in nearly every case. Marshall's argument then pretends to resolve the impasse by recommending particular perspectives for particular problems, *not* because these perspectives describe what people will actually perceive — in each case, some people will perceive endorsement, and some won't — but because the perspectives will generate results consistent with *other* sound policies, such as stare decisis and maintenance of our cultural heritage. But then why not just identify and adopt such other sound policies in the first place? Despite all the discussion of symbolism and perceptions, those factors ultimately seem to be little more than a façade for decisions actually to be made on other grounds ushered in through the back door.²²⁸

Thus, the neutrality attained through symbolism turns out to be illusory. We cannot achieve the appearance of neutrality unless we first know what actual neutrality means. But if we knew what actual neutrality meant, why would we be content with a merely symbolic neutrality?

B. *Neutrality as a Parasitic Concept*

The problems both with the "no endorsement" test and with the jurisprudence of symbolism can be traced to a common cause: the concept of neutrality. That concept, paradoxically, appears to be both irresistible and yet so indeterminate as to be almost meaningless. But how can an idea be at once indispensable and useless?

forbid "endorsement," but only "improper" endorsement, then the basic question which Marshall purports to answer once again becomes wide open: What, under the establishment clause, may government "properly" do?

228. Unlike Marshall, Professor Johnson does not prescribe particular perspectives for assessing the appearances or perceptions created by government policies. He implies, rather, that all perspectives should be taken into account, and suggests that government can appear neutral by siding sometimes with one position and sometimes with an opposing position, thereby avoiding the appearance of any uniform or systematic favoritism. Johnson, *supra* note 112, at 839-41. Johnson argues that current doctrine, despite its analytical deficiencies, may serve satisfactorily if applied in a spirit of fairness and compromise. *Id.* at 839-40, 845-46. More recently, Marshall likewise appears to have moved toward such a position favoring symbolic neutrality in the aggregate. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 929 (1986). The hope is that such an approach will make everyone at least partly happy. The current state of consternation over *Lemon*, however, see notes 9-19 *supra* and accompanying text, at least suggests the possibility that such an approach will in fact leave everyone deeply unhappy.

1. *An Analogy — Neutrality and the Judge*

In an effort to dissolve that paradox, it is helpful to begin by exploring what neutrality means in a context where it is somewhat more familiar. In deciding cases, judges are expected to be neutral; judicial neutrality might therefore serve as a useful analogue to the neutrality one might ask of the state generally in matters of religion.²²⁹ Suppose that a newly appointed judge must decide a contract case between a prosperous merchant and a cancer-afflicted widow. Although the judge knows very little about the case at this point, she is well acquainted with her own predispositions; she knows that she is generally sympathetic to widows and to cancer victims, and that she has no great fondness for merchants. She does not apologize for these predispositions, but believes she could articulate plausible reasons for holding them. At the same time, the judge believes she is obligated to act neutrally, both in the way she conducts the proceedings and in the way she ultimately decides the case. She therefore asks us, her law clerks or advisers, to explain, first, what neutrality means and, second, how the idea of neutrality should guide her in conducting and deciding the case.

In answering the first question, we might begin by suggesting that neutrality means the judge should not favor or aid either party to the dispute. This "no favoritism" version of neutrality is probably correct in some sense. But it may also be badly misleading. During the course of the proceedings, the judge will be asked to rule on numerous motions regarding discovery, the conduct of the trial, the admissibility of evidence, jury instructions, and other matters. In granting or denying such motions, the judge will inevitably rule "in favor of," and will thereby give assistance to, one party or the other. Similarly, at the conclusion of the case the judge will be expected to enter a judgment "in favor of" one of the parties. Taken too literally, a version of neutrality which forbids "favoring" either party might prevent the judge from performing these essential tasks.

If the judge were to raise this concern, we would of course assure her that our admonition against favoring either party does not mean she cannot rule in their favor on motions or in her final judgment. But then what exactly *does* the admonition mean? The "no favoritism"

229. Cf. Beschle, *supra* note 45, at 174 (comparing establishment neutrality to that required of a "judge or an umpire"). Of course, since conceptions of neutrality differ, the analogy will not be equally pertinent to every conception, and some conceptions might therefore be immune to the analysis which follows. I would suggest, however, that exploring the analogy to judicial neutrality helps to identify a core sense of neutrality which underlies the appeal the concept has exhibited.

version of neutrality obviously must be qualified to mean only that *some kinds* of favoring are forbidden. But the qualified version simply reformulates the original question: What kinds of favoring does neutrality forbid?

A related response might seek to answer this question by proposing that neutrality means equal treatment. Thus, the judge, in ruling upon motions and in deciding the case, may favor or aid the parties so long as she treats them equally. But this explanation, like the previous one, is acceptable only if understood in some qualified sense that the explanation itself fails to articulate. Taken literally, the "equal treatment" version of neutrality might lead to absurd results. If the judge grants ten evidentiary objections made by the widow, can the merchant plausibly argue that equal treatment requires the judge to grant ten of *his* evidentiary objections? And what would it mean for the final judgment to treat the parties equally? Must each party receive half of the relief that he or she is seeking?

The "no favoritism" and "equal treatment" proposals thus force us to consider the further questions: What kinds of "favoring" does neutrality forbid? In what sense should a judge treat the parties equally? Those questions may lead to the following answer. The bodies of law known as civil procedure and evidence prescribe rules or criteria that the judge should look to in conducting a case and in admitting or excluding evidence. Likewise, the law of contracts contains rules or criteria that should guide the judge in deciding whether a valid and enforceable contract exists. Neutrality means that in conducting the proceeding, and ultimately in deciding the case, the judge should act only upon the basis of proper rules or criteria, rather than upon other factors that the law regards as extraneous or improper. There are, in other words, factors that the law deems to be proper bases for a decision, and other factors that are not considered by the law to be germane. So long as the judge bases her decisions upon proper considerations, she can be said to be acting neutrally.²³⁰

This explanation of neutrality gives content and scope to the incomplete and potentially misleading definitions considered earlier. Strictly speaking, the assertion that the judge must not favor or assist widows is simply not true. The widow may prevail on the merits, and

230. Often, of course, the propriety of considering particular factors may be debatable. If the judge consults a particular factor which she considers properly relevant, critics of the decision may argue that she acted incorrectly because the factor should not be relevant. Charges that the judge did not act "neutrally," by contrast, are most likely to be made in cases in which the judge is believed to have been influenced by factors that everyone, including the judge herself, would agree to be improper, such as personal sympathy or aversion to one of the parties, or a personal stake in the outcome.

the judge must then issue a judgment in her favor — a judgment that may provide substantial assistance to her. The “no favoritism” version of neutrality is acceptable, however, if it is understood to mean that the judge must not favor or assist either party *except in accordance with proper criteria*. Similarly, the judge treats the parties equally if she favors or disfavors them only upon the basis of proper criteria. Thus, she may treat the merchant equally even though she denies every one of his motions and issues judgment against him, so long as those decisions are based upon the criteria prescribed by the law.²³¹

It seems most helpful, in sum, to understand neutrality not as “no favoritism” or equal treatment — although those definitions, properly qualified, may be correct — but rather as adherence to accepted or proper criteria of decision. Having offered that response to the judge’s first question, we must now consider her second question: How does the concept of neutrality guide the judge in conducting the proceedings and deciding the case? And the unhappy answer seems to be that the concept is of no help at all. If the judge knows what the proper rules or criteria for decision are, the neutrality norm tells her that she should act on the basis of those rules or criteria. But that counsel is superfluous; if the judge already knows that such criteria are the proper bases for her decision, we add nothing to her knowledge by telling her she should act upon such criteria. On the other hand, if the judge does *not* already know what the proper criteria for decision are, telling her to be neutral will leave her as much in the dark as ever about how to conduct and decide the case.

It might seem that neutrality at least cancels out the judge’s initial predispositions or prejudices by telling her that she must not decide the case for the widow *because* she is a widow, or against the merchant *because* he is a merchant. But even those prohibitions cannot be deduced from the concept of neutrality. Rather, they derive from the fact that widowhood and merchanthood are not included among the substantive criteria that the law deems proper bases for a decision. To the extent that the law *does* make a party’s merchant status relevant,²³² the merchant cannot complain if that status influences the judge, just as he could not complain, when the evidence shows he de-

231. The same point can be made about the neutrality expected of an umpire or referee in an athletic contest. The umpire is expected to enforce the rules in an evenhanded fashion. So long as the judge acts consistently in accordance with the rules, he can be said to have treated each side fairly and equally, even if most of the infractions happen to be committed by and called against one of the sides.

232. For instance, decisions in cases under the Uniform Commercial Code may properly turn on whether the seller of goods is a “merchant.” See 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 10, 70, 238 (1964).

frauded the widow, that the judge violated neutrality by deciding the case against him just because he was a defrauder. The concept of neutrality, in short, provides no independent guidance to the judge, but merely reaffirms the substantive law upon which it is parasitic.

Although the concept of neutrality provides little practical assistance to the judge in deciding a case, however, it hardly follows that the concept is inapplicable to the judge, or that it deserves to be repudiated. On the contrary, the assertion that the judge should be neutral is still perfectly, and indeed tautologically, true. Conversely, it would be perverse and even self-contradictory to suggest that the judge need not act neutrally; the suggestion would amount to asserting, illogically, that a judge may properly base a decision upon improper criteria.

Neutrality, in short, remains an essential judicial virtue. Moreover, the concept has value in discourse about judging; when we believe that a judge has acted upon a criterion that is generally regarded as an impermissible basis for decision, such as personal sympathy or aversion, we can intelligibly express that criticism by saying that the judge has violated the obligation of neutrality. What the concept *cannot* do, however, is supply the substantive rules or criteria which guide judicial decisionmaking.

2. *The Analogy Applied — Neutrality and Religion*

Applied to the problem of church-state relations, this analysis of neutrality helps to explain why the concept is so irresistible and yet so apparently barren, and even productive of confusion. Just as neutrality forbids the judge to "favor" either party to a dispute, neutrality precludes the state from "favoring" either religion or nonreligion.²³³ As with judicial neutrality, however, that explanation is not especially helpful. Government inevitably must act in myriad ways that help or hinder religious or nonreligious interests. Laws often reinforce aspects of morality favored by some religions²³⁴ but burden other religious practices. Public education equips children to read scriptures; it may also contradict, displace, or weaken particular religious beliefs. Fire departments put out fires in churches — and in nightclubs and casinos. Roads maintained by the state facilitate travel to church services — and to recreation that draws people away from church services. Of

233. *Cf.* *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (neutrality means "no favoritism among sects or between religion and nonreligion" (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring))).

234. See Zimmerman, *To Walk a Crooked Path: Separating Law and Religion in the Secular State*, 27 WM. & MARY L. REV. 1095, 1096 (1986) ("[M]any criminal laws, as well as many laws governing family relations or touching on other moral concerns, are congruent with and often derived from the insights of the Judeo-Christian faiths.").

course, many public measures do not deliberately seek to help or hinder religion (although they in fact help or hinder religion nonetheless); but some do. Governments grant conscientious objector status, or require employers to accommodate their employees' religious concerns.

Thus, in one sense, government constantly and inevitably both favors and disfavors — and assists and inhibits — religion. Even as we insist that government must not aid or favor religion, we instinctively sense that the extension of police and fire protection to churches does not fall within the prohibition. But why not? The problem with the “no favoritism” version of neutrality is that it is too gross; in its apparent absoluteness it gives no guidance as to what kinds of favoring are permissible and what kinds are not. Moreover, this account of neutrality is not only misleading but dangerous, since there is no assurance that someone, including a judge, might not take it at face value. The consequence of that course can only be confusion.

Likewise, neutrality means that government must in some sense extend equal treatment to differing religions, as well as to religion and nonreligion.²³⁵ But that admonition surely cannot mean that government must somehow equalize the public benefits and burdens conferred and imposed upon religion and nonreligion. Such a requirement is not merely impracticable; it is unintelligible. How would we know what to count as religious and nonreligious interests, and how would we aggregate and compare the benefits received and the burdens incurred by each? If government decides to subsidize farmers, must it equally subsidize clergy? (In total dollars? In proportion to their respective numbers? Their respective needs?) If money is allocated to enhancing the nation's war-making capacity, must matching funds be set aside to support the promulgation of the Gospel? A plausible account of establishment neutrality cannot require us to ask, much less answer, such questions.

A more adequate statement of neutrality would assert that neutrality requires government, like the judge, to act in matters that affect religion only upon proper criteria. So long as it acts upon proper criteria, government can be regarded as avoiding improper favoritism and as treating religion and nonreligion equally. But this proposition, though it explains neutrality, does not tell us what government can and cannot do; it leaves unanswered the critical question of what the proper criteria are. And with respect to *that* question, neutrality sim-

235. Cf. *Larson v. Valente*, 456 U.S. 228 (1982) (applying equal protection strict scrutiny as part of establishment analysis).

ply has nothing to say. Neutrality is parasitic upon — not the parent of — substantive doctrine.

This assessment illuminates the underlying problem with an establishment jurisprudence dedicated to the ideal of neutrality. The problem is not that the ideal is inapposite or incorrect; the ideal is, on the contrary, essential. The error is in expecting from neutrality more than it can deliver. Scholars and judges ought to pay due respect to the ideal of neutrality — and then recognize that all the hard analytical, interpretive, or historical work remains to be done. If they insist that the ideal of neutrality do that work for them, the inevitable consequence will be confusion.

CONCLUSION: BEYOND SYMBOLISM AND NEUTRALITY

Blood, it is said, cannot be squeezed out of a stone; but the proverb's continuing active circulation suggests that people persist in trying. Substantive establishment doctrine, similarly, cannot be deduced from the ideal of neutrality. The ideal is valid but parasitic; it is dependent upon — rather than generative of — substantive criteria or rules for regulating church-state relations. But neither scholars nor judges seem ready to give up the attempt — hence the appeal, and the futility, of Justice O'Connor's "no endorsement" test. By focusing upon a law's symbolic effects and the perceptions it creates, the test seems to derive guidance from the ideal of neutrality while avoiding the conundrums that have plagued efforts to give substantive content to that ideal. But the appearance is an illusion — and one which disappears when the test is critically examined. Such an examination reveals that the "no endorsement" test is riddled with analytical flaws that can only compound the confusion and inconsistency afflicting current establishment doctrine.

Thus, adoption of the "no endorsement" test would simply initiate another era of chaotic results — and ensuing accusations of disingenuousness and doctrinal manipulation. While establishment doctrine undoubtedly needs reexamination, the "no endorsement" test is not the solution. The test's deficiencies should rather prompt scholars and jurists to explore other doctrinal alternatives,²³⁶ unencumbered by the illusion that substantive answers can be deduced from the formal idea

236. For instance, efforts to develop a doctrine devoted to preventing governmental coercion of religious belief and practice, *see, e.g.*, McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980), seem much more promising than attempts to resolve church-state problems by reference to the formal concept of neutrality.

of neutrality, or that doctrinal problems can be avoided by retreating into symbolism and appearances.